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A MANUAL FOR COURTS-MARTIAL

U. S. ARMY

Revised in the Office of
The Judge Advocate General of the Army,
and published by direction of
The President

Effective April 1, 1928

Corrected to April 20, 1943

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EXECUTIVE ORDER NO. 4773

By virtue of the powers in me vested as President of the United States of America, and pursuant to Chapter II of an act of Congress entitled "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 759), I prescribe the following Manual for Courts-Martial and direct that it be published for the government of all concerned. This manual shall be in force and effect in the Armies of the United States on and after April 1, 1928; except that its provisions, other than as to mere matters of procedure and other than any provisions alleviating the punishment to be imposed upon conviction in any case, do not supersede the provisions of the Manual for Courts-Martial, 1921, with respect to acts done or offenses committed prior to April 1, 1928.

CALVIN COOLIDGE

THE WHITE HOUSE,

November 29, 1927.

[Subsequent Executive Orders have prescribed amendments to various paragraphs of the Manual, as follows.

No. 8727 (April 1, 1941), amending paragraphs 104b and 104c

No. 9048 (Feb. 3, 1942), amending paragraph 104c.

No. 9216 (Aug. 7, 1942), amending paragraph 117a.

No. 9267 (Nov. 9, 1942), amending paragraph 104c

No. 9324 (March 31, 1943), amending paragraphs 14, 85a, 87b, 87c, 91, 94, 96, 103d, 125, 129, and 155, and App. 4 and 10.

The amendments prescribed by these five orders have been incorporated in the text of this edition of the Manual.]

CHAPTER II

COURTS-MARTIAL

CLASSIFICATION—COMPOSITION

2. COURTS-MARTIAL—Classification.—General, special, and summary courts-martial. (A. W. 3.)

4. COURTS-MARTIAL—Composition.—*a. Who may serve.*—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial. (A. W. 4.)

No distinction exists among the various classes of "officers in the military service of the United States" with respect to their competency to serve; but the term "officers" here refers to commissioned officers only. (A. W. 1.) Members of the Army Nurse Corps and warrant officers are therefore not competent to serve on courts-martial.

For notes as to retired, reserve, and National Guard officers, see under A. W. 4, App. 1.

No officer shall be eligible to sit as a member of a general or special court-martial if he is the accuser (see 60) or a witness for the prosecution (see 59; A. W. 8, 9), or in case of a rehearing if he was a member of the court which first heard the case (see 89; A. W. 50½). Suspension from rank renders an officer ineligible to sit as a member of a court-martial.

The availability of certain officers for detail may be restricted by regulations. See, for examples, AR 60-5 (Chaplains) and AR 170-10 (Officers at exempted stations).

b. Number of members.—General courts-martial may consist of any number of officers not less than five (A. W. 5); special courts-martial of any number of officers not less than three (A. W. 6); and a summary court-martial shall consist of one officer (A. W. 7).

c. Rank of members.—In no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank (A. W. 16), or by those below him on the promotion list. Relative rank is determined as indicated in AR 600-15.

d. Qualifications of members.—When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament.

~~COURT-MARTIAL COMPOSITION~~

officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof. (A. W. 4.)

c. Law member for general court-martial.—The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. (A. W. 8.)

CHAPTER III

COURTS-MARTIAL

(Continued)

APPOINTING AUTHORITIES—APPOINTMENT OF TRIAL JUDGE ADVOCATE, DEFENSE COUNSEL, ASSISTANTS

1. COURTS-MARTIAL—Appointing Authorities.—*a. General courts-martial.*—The President of the United States, the superintendent of the Military Academy (except for the trial of an officer, A. W. 19), and the other commanding officers designated in A. W. 8 may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority. (A. W. 8.)

Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. See 60 (Accuser) in this connection. Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases.

As A. W. 8 expressly designates those who have authority to appoint general courts-martial, it follows that no one else has any such authority, and that anyone having such authority can not delegate or transfer it to another. The authority of a commanding officer to appoint general courts-martial is independent of his rank and is retained by him as long as he continues to be such commanding officer. The rules as to the devolution of command in case of the death, disability, or temporary absence of a permanent commander are stated in AR 600-90.

An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it; but he can not control the exercise by the court of powers vested in it by law. He may withdraw any specification or charge at any time before the court has reached a finding thereon.

b. Special courts-martial.—The commanding officers designated in A. W. 9 may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable. (A. W. 9.)

The principles of the last three subparagraphs of 5a apply to special courts-martial.

A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same. The term is used in a disciplinary sense, and is not necessarily limited to what constitutes detachment in a physical or tactical sense. For instance, the commanding officers of units that are independent, except in so far as they constitute parts of a division, who are responsible directly to the division commander for the maintenance of discipline in their respective commands, are competent to appoint special courts for the same, subject to the power of the division commander to appoint special courts for all subordinate organizations and detachments under his command if by him deemed desirable.

The subordinate commander may exercise the power to appoint special courts-martial for his command unless a competent superior deems it "desirable" to reserve that power to himself and so notifies the subordinate.

c. Summary courts-martial.—The commanding officers designated in A. W. 10 may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. (A. W. 10.)

Where the appointing authority of a summary court or the summary court officer is the accuser or the prosecutor of the person or persons to be tried, it is discretionary with the appointing authority whether he will forward the charges to superior authority with a recommendation that the summary court be appointed by the latter; but the fact that the appointing authority or the summary court officer is the accuser or prosecutor in a particular case does not invalidate the trial.

When more than one officer is present, a subordinate officer will be appointed summary court-martial. When but one officer is present, no order appointing the court will be issued.

8. COURTS-MARTIAL—Jurisdiction in General—Persons.—As to persons subject to military law, see A. W. 2. In addition to the persons described in A. W. 2 are the following:

Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section 1621 of the Revised Statutes, while so serving. (Act of August 29, 1916, 39 Stat. 573.)

Various other classes of persons by statutes, which, being of infrequent application, are merely cited in the notes under A. W. 2, App. 1.

Jurisdiction, limited as to persons, is given courts-martial by A. W. 2 to try certain offenses against the laws for the government of the naval service.

9. COURTS-MARTIAL—Jurisdiction in General—Contempts.—A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. (A. W. 32.) See 101 (Contempts).

10. COURTS-MARTIAL — Jurisdiction in General — Termination.—General Rule.—The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service.

Exceptions.—To this general rule there are, however, some exceptions, among them the following:

Jurisdiction as to certain cases of fraud and embezzlement is not terminated by discharge or dismissal. See A. W. 94.

All persons under sentence adjudged by courts-martial remain subject to military law while under such sentence (A. W. 2.)

Where a soldier obtains his discharge by fraud, the discharge may be canceled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and may be tried for his fraud.

A discharge, other than dishonorable, releases only from the particular contract and term of enlistment to which it relates, and therefore does not terminate other subsisting enlistments or relieve the soldier from liability to trial by court-martial for an offense committed during any of such enlistments. On the other hand a dishonorable discharge terminates all subsisting enlistments, and a soldier dishonorably discharged can not be tried by court-martial for an offense committed during any such enlistment, except as provided in A. W. 94 and as stated in the next subparagraph.

does not interrupt his status as a person belonging to the general category of persons subject to military law, court-martial jurisdiction does not terminate. Thus, where an officer holding an emergency commission was discharged from said commission by reason of acceptance of a commission in the Regular Army, there being no interval between services under the respective commissions, it was held that there was no termination of the officer's military status, but merely the accomplishment of a change in his status from that of a temporary to that of a permanent officer, and that court-martial jurisdiction to try him for an offense (striking enlisted men) committed prior to the discharge was not terminated by the discharge. So also, where a dishonorably discharged general prisoner was tried for an offense committed while a soldier and prior to his dishonorable discharge, it was held that such discharge did not terminate his amenability to trial for the offense.

Effect of escape.—The fact that after arraignment and during the trial the accused has escaped does not terminate the jurisdiction of the court, which may proceed with the trial notwithstanding the accused's absence.

11. COURTS-MARTIAL—Jurisdiction in General—Exclusive and nonexclusive.—Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to military law is, as a rule, subject to the municipal law applicable to persons generally, and if by one act or omission he violates an Article of War and the local criminal law, such act or omission may be made the basis of a prosecution before a court-martial or before the proper civil tribunal, and in some cases before both, the jurisdiction which first attaches in any case being in general entitled to proceed. If in a case where an application under A. W. 74 for delivery to the civil authorities is anticipated, good reason exists for the primary exercise of military jurisdiction, charges should be promptly preferred.

The provisions of the Articles of War conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war are triable by such military commissions, provost courts, or other military tribunals. (A. W. 15.) See A. W. 80-82 for instances of concurrent jurisdiction expressly conferred on courts-martial and certain other tribunals.

12. COURTS-MARTIAL—Jurisdiction of General Courts-Martial—Persons and offenses.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable

able by the Articles of War, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the superintendent of the Military Academy. (A. W. 12.)

13. COURTS-MARTIAL—Jurisdiction of General Courts-Martial—Punishment.—Punishment upon conviction is discretionary with a general court-martial within certain limitations, the more important of which are as follows: Certain punishments are mandatory under the law (e. g., A. W. 95); such discretion may be limited by the President under A. W. 45; the death penalty can be imposed only when specifically authorized (A. W. 43); and certain kinds of punishment are prohibited (A. W. 41).

The statutory limitations just mentioned and other limitations will be fully taken up in other connections. See in particular 102–104 (Punishments).

14. COURTS-MARTIAL—Jurisdiction of Special Courts-Martial—Persons and offenses.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by the Articles of War: *Provided*, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law (A. W. 13): *Provided further*, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial, notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in A. W. 13: but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed. (A. W. 12.)

Under the authority of A. W. 13 commissioned officers and persons of equivalent, relative or assimilated rank are hereby excepted from the jurisdiction of special courts-martial.

The crimes and offenses denounced in A. W. 64, 66, 67, and 92 are capital at all times; those denounced by A. W. 58, 59, 75–78, 81, 82, and 86 are capital if committed in time of war.

Although capital under one of the articles just cited, a crime or offense is not capital within the meaning of A. W. 13 if the applicable maximum limit of punishment prescribed by the President under A. W. 45 is less than death; and even though a crime or offense is capital within the meaning of A. W. 13, it may be tried by a special court-martial under the conditions stated in the proviso of A. W. 12, quoted above. But no crime or offense, capital or otherwise, for which a mandatory punishment is prescribed, can be tried

by a special court-martial, as the penalty in the event of conviction must be either death or imprisonment for life.

15. COURTS-MARTIAL—Jurisdiction of Special Courts-Martial—Punishment.—A special court-martial can not adjudge death (A. W. 12, 13), dishonorable discharge of an enlisted man (A. W. 108), dismissal of an officer (A. W. 118), confinement in excess of six months (A. W. 13), or forfeiture of more than two-thirds pay per month for a period of not exceeding six months (A. W. 13). See in this connection 102-104 (Punishments).

16. COURTS-MARTIAL—Jurisdiction of Summary Courts-Martial—Persons and offenses.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet (i. e., cadet of the United States Military Academy), or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital (see 14) made punishable by the Articles of War: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law. (A. W. 14.)

Under the authority of A. W. 14, persons of actual, relative, or assimilated rank above that of private, first class, in the Army are hereby excepted from the jurisdiction of summary courts-martial, provided that noncommissioned officers of actual, relative, or assimilated rank below that of technical sergeant in the Army may be tried by summary court-martial, either if they do not object, or if such trial is authorized by the officer competent to bring them to trial before a general court-martial.

17. COURTS-MARTIAL—Jurisdiction of Summary Courts-Martial—Punishment.—A summary court-martial can not adjudge dishonorable discharge of an enlisted man (A. W. 108), confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay. (A. W. 14.) See also 102-104 (Punishments).

Summary court-martial may not lawfully sentence a soldier to one month's confinement and three months' restriction to limits, but only one or the other of the two forms of deprivation of liberty may be adjudged in maximum amount in any one sentence. If it be desired

to adjudge both forms of punishment, i. e., confinement and restriction to limits, in one and the same sentence, there must be an apportionment. For example, assuming the punishment to be in conformity with other limitations, a summary court might impose confinement at hard labor for 15 days; restriction to limits for 45 days; and forfeiture of two-thirds of one month's pay.

CHAPTER V

COURTS-MARTIAL—PROCEDURE BEFORE TRIAL

ARREST AND CONFINEMENT—ARREST OF DESERTER BY CIVILIANS

18. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Arrest and Confinement—Scope of paragraphs on this subject.—The paragraphs on this subject deal primarily with the arrest or confinement of persons subject to military law in connection with trial by court-martial, and deal incidentally only or not at all with arrest and confinement of such persons for other purposes, with the arrest and confinement of persons not subject to military law, and with various other matters touching arrest and confinement such as those discussed in 138, 139, and 140. See in this connection AR 600-355, 600-375.

19. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Arrest and Confinement—General and miscellaneous.—Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. (A. W. 69.) This requirement is not mandatory. Arrest or confinement may, in the interest of the Government, be deferred until arraignment, and failure to arrest or confine does not affect the jurisdiction of the court.

No person will be placed in arrest or confinement under the authority of A. W. 69 except on personal knowledge of, or after inquiry into, his offense. The character and duration of the restraint imposed before and during trial, and pending final action upon the case, will be the minimum necessary under the circumstances. For instance, upon notification from a trial judge advocate as to the result of trial (see 416), a commanding officer should take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may include, for example, the release of such person from any restraint, or the imposition of any necessary restraint pending final action on the case.

If pending trial or final action upon a case, an order affecting the accused is received, the commanding officer may, to the extent he deems necessary, and irrespective of whether the accused is under any restraint, suspend the order so far as it affects the accused; provided

it is reasonably apparent that the authority issuing the order was not aware of the pending proceedings, and that had he been so aware he would not have issued the order as it stands. Any suspension of an order will be duly and promptly reported to the proper authority.

The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority. See 157 (Brief in habeas corpus case).

20. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Arrest and Confinement—Who may order; method.—The following classes of persons subject to military law will be placed in arrest or confinement under A. W. 69, as follows:

Enlisted Men.—By officers only, in person, through other persons subject to military law, or by oral or written orders or communications. The commanding officer of any company or detachment may delegate to the noncommissioned officers thereof authority to place enlisted men belonging to his company or detachment, or temporarily within its jurisdiction, e. g., in his quarters or camp, in arrest or confinement as a means of restraint at the instant when restraint is necessary.

Officers, Members of the Army Nurse Corps, Warrant Officers.—By commanding officers only, in person, through other officers, or by oral or written orders or communications. The authority to place such persons in arrest or confinement will not be delegated. Subject to such limitations as may be imposed by superior competent authority the term "commanding officer" includes the commanding officer of a garrison, fort, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors.

For reports, etc., required in case of confinement or arrest and for action required when a commanding officer places an officer in arrest or confinement without preferring charges, see AR 600-355.

21. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Arrest and Confinement—Status of person in arrest.—Any person placed in arrest under the provisions of A. W. 69 shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. (A. W. 69.)

For other restrictions see AR 600-355.

22. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Arrest of Deserter by Civilians—Civil officers.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of

the United States and deliver him into the custody of the military authorities of the United States. (A. W. 108.)

25. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Arrest of Deserter by Civilians—Civilians generally.—A private citizen has no authority as such, without the order or direction of a military officer, to arrest or detain a deserter from the Army of the United States (Kurtz v. Moffitt, 115 U. S. 487); but sending out a description of a deserter with a request for his arrest and the offer of a reward for his apprehension and delivery, coupled with the provisions of law and regulations authorizing the payment of such reward, is sufficient authority for the arrest of a deserter by a private citizen.

The fact that the person who arrested and delivered a deserter was not authorized to do so is not a legal ground for the deserter's discharge from military custody.

CHAPTER VI

COURTS-MARTIAL—PROCEDURE BEFORE TRIAL

(Continued)

PREPARATION OF CHARGES

24. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Preparation of Charges—Definitions.—The formal written accusation in court-martial practice consists of two parts, the technical charge and the specification. The charge, where the offense alleged is a violation of the articles, merely indicates the article the accused is alleged to have violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation. Each specification, together with the charge under which it is placed, constitutes a separate accusation. The term "charges" or "charges and specifications" is applied to the formal written accusation or accusations against an accused.

New and separate charges preferred after others have been preferred are known in military law as "additional charges." Such charges may relate to transactions not known at the time the original charges were preferred or, as is more frequent, they may relate to offenses committed after the original charges were preferred. Charges of this character do not require a separate trial, but, subject to the usual procedure, may be tried with the original charges.

25. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Preparation of Charges—Who may initiate; who may prefer; ordering preferment.—Charges are frequently initiated by some one bringing to the attention of the military authorities information concerning a supposed offense committed by a person subject to military law. Such information may, of course, be received from anyone, whether subject to military law or not.

Any person subject to military law may prefer charges, even though he be under charges, or in arrest, or in confinement.

Instead of preferring charges it is ordinarily preferable, especially in a minor case, to inform the accused's immediate commanding officer of the matter.

A person subject to military law can not legally be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility; but he may legally be ordered by

a proper officer to prefer such charges as in his (the subordinate's) opinion he may properly substantiate by the required oath. (See 4.)

26. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Preparation of Charges—When preferred.—When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. (A. W. 70.) When it is intended to prefer charges, they should be preferred without unnecessary delay. Anything like an accumulation or saving up of charges through improper motives is prohibited; but when a good reason exists (e. g., when in the interest of discipline it is advisable to exhibit a continued course of conduct) a reasonable delay is permissible if the person concerned is not in arrest or confinement.

Ordinarily charges for an offense should not be preferred against anyone when the only basis for the belief that the offense was committed is his statement that he committed it.

27. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Preparation of Charges—General rules and suggestions.—One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. Thus a soldier should not be charged with disorderly conduct and for an assault when the disorderly conduct consisted in making the assault, or for a failure to report for a routine scheduled duty, such as reveille, and for absence without leave, when such failure to report occurred during the period for which he is charged with such absence without leave. So also the larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification (see 149g, Larceny); and where a soldier willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is again given by the same or other superior, a multiplication of charges of disobedience should be avoided. However, there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses.

Where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions unless the latter serve to explain the circumstances of the former. Thus, as an extreme case, charges for willfully disobeying an order of a commissioned officer and for absence from a routine duty should not be joined.

Any demand for trial made under A. W. 104 may be noted on a memorandum attached to the charges.

In joint offenses the participants may be separately or jointly charged. See forms in App. 4 (Instructions, *f*). In drafting charges in such cases consideration should be given to the increased labor, time, and expense that may be involved in separate trials.

Two or more persons can not join in the commission of one offense of a kind that can only be committed by one person. For instance, soldiers A and B can not join in the offense committed by B in absenting *himself* without leave with the intent not to return to the military service, even if A also leaves without authority with a like intent, and the two desert together. A has deserted and so has B, but neither committed the other's desertion. In a proper case, however, two or more men may be jointly charged with, and tried for, conspiracy, or entering into an agreement to desert.

28. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Preparation of Charges—Drafting of charge.—The technical charge should be appropriate to all specifications under it, and ordinarily will be written thus: "Violation of the—Article of War," giving the number of the article. Neither the designation of a wrong article, nor the failure to designate any article is ordinarily material, provided the specification alleges an offense of which courts-martial have jurisdiction. For other instructions and some specimen charges see App. 4.

29. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Preparation of Charges—Drafting of specification.—*a*. The specification should include the following:

The name of the accused person and a showing, either by a description of such person by rank and organization or otherwise, that the accused is within court-martial jurisdiction as to persons. For rules as to the use of the Christian name; use of an alias; change in rank; general prisoners; etc., see instructions in App. 4.

A statement in simple and concise language of the facts constituting the offense. The facts so stated and those reasonably implied therefrom should include all the elements of the offense sought to be charged. Any intent expressly made an essential element of the offense by the Articles of War should be alleged; for example, a false muster should be alleged as "knowingly" made. To a reasonable extent matters of aggravation may be recited. If applicable, the wording of the appropriate Article of War should be used in preference to a supposedly equivalent expression. Thus in charging an officer found drunk on duty, the specification should not allege that he was found intoxicated on duty.

A statement of when and where the offense was committed. For details, see App. 4 (Instructions, *g*).

b. A specification should not allege more than one offense, conjunctively or in the alternative. Thus a specification should not allege that the accused "lost and destroyed" or that he "lost or destroyed" certain property.

c. A specification alleging the violation of a written order, or of any written obligation—as an oath of allegiance, parole, etc.—should set forth the writing, preferably verbatim, and the act or acts which constitute the alleged violation. Oral statements should be set out as nearly as possible in exact words, but should always be qualified by the words "or words to that effect," or some similar expression, as, for example, in cases of insubordinate or disrespectful language.

d. Some specimen charges and forms for specifications covering the more usual offenses are given in App. 4.

CHAPTER VII

COURTS-MARTIAL—PROCEDURE BEFORE TRIAL

(Continued)

SUBMISSION OF AND ACTION UPON CHARGES

30. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Submission of and Action Upon Charges—General.—In the ordinary case charges will be submitted and acted upon as follows:

a. Charges properly signed and sworn to (see 31) will be forwarded (see 32) to the commanding officer who, under A. W. 10, has immediate authority to appoint summary courts-martial for the command to which the accused belongs or pertains.

b. As a rule, the charges will be so forwarded through the commanding officer exercising immediate jurisdiction under A. W. 104 over the command which includes the accused. If so forwarded, such officer will, before transmitting the charges, take the action described in 33.

c. The officer referred to in *a* will take such action with respect to each offense charged as is within his authority and is deemed by him best in the interest of justice and discipline (see 34), provided:

First: No charge shall be recommended for trial by general court-martial unless, prior to such action, the thorough and impartial investigation thereof required by A. W. 70 (see 35*a*) shall have been made by an officer.

Second: If he also has general court-martial jurisdiction, he will refer no case for trial by general court-martial until the thorough and impartial investigation thereof required by A. W. 70 (see 35*a*) shall have been made by an officer and until the case has been referred to his staff judge advocate for consideration and advice. (See 35*b*.)

Third: No charge will ordinarily be referred for trial if he is satisfied that the accused is insane or was insane at the time of the offense charged. (See 35*c*.)

d. Any commanding officer, superior to the officer referred to in *a*, to whom the charges may be forwarded will take the action described in *c* subject to the same limitations.

Exceptional cases.—In exceptional cases where the accused is not, strictly speaking, under the command of any military authority in-

terior to the War Department, for example, retired personnel not on active duty or military attachés, the general principles of this paragraph (30) are applicable; but the charges may, according to the particular circumstances, be transmitted either to the War Department or to the commanding officer of the territorial department, corps area, or district in which the accused may be.

31. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Submission of and Action Upon Charges—Signing and swearing to charges.—See first paragraph of A. W. 70. Charges and specifications will be signed and sworn to substantially as indicated on the form. (See App. 8.) Such of the data as to service, witnesses, etc., called for by the form as may be available will be included. In the absence of instructions by appointing or other authorities, only the original need be signed; but a suitable number of copies (usually two besides the original), depending on the probable disposition of the case, will ordinarily be prepared and forwarded if such facilities as typewriter and carbon paper are available.

Charges need not be sworn to if the person signing them believes the accused to be innocent, but deems trial advisable in the interest of the service as well as for the protection of the accused (e. g., in a case of homicide of an escaping prisoner which was apparently justified). In no case, however, should an accused be tried on unsworn charges over his objection.

32. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Submission of and Action Upon Charges—Forwarding charges.—Where it appears probable that the case will be disposed of either under A. W. 104 or by reference to a summary court-martial, the person preferring the charges need not forward them by letter of transmittal. Otherwise the charges will be so forwarded, and the letter will include or carry as inclosures a summary of the evidence on which the charges are based as derived or expected from each witness or other source. The signatures of witnesses to the summaries of their respective testimony will be obtained when practicable and when an undue delay in forwarding the charges will not result. In any case, all reasonably available documentary evidence (originals or admissible copies) will be forwarded with the charges unless, on account of the bulk of such evidence or other good reason, it is inadvisable to do so.

33. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Submission of and Action Upon Charges—Action by commander exercising immediate jurisdiction under A. W. 104.—He will act under A. W. 104 with reference to such offenses as may properly be disposed of under that article. Specifications and charges thus disposed of will be lined out and initialed. In order that the meaning of the affidavit to the charges may not be changed, the numerical designation of charges and specifications as set forth in the affidavit will be made to correspond to

any renumbering made necessary by the elimination of any specification or charge. Any demand for trial made by an accused (see 107) will be noted and initialed opposite the proper specification.

As to offenses not disposed of under A. W. 104, he will proceed as follows: He will attach to the charges any available evidence of previous convictions; supply any missing data as to service, witnesses, etc., called for by the form (App. 3) that may be reasonably available; correct any errors in such data, initialing such corrections; and take appropriate action with respect to the restraint (see 20) of the accused. He will make no corrections or changes in the charges themselves. If practicable he will make or cause to be made an investigation of the charges (see 35). The report of the investigation in the case will be informal or formal, depending on whether or not in his opinion the case will probably be disposed of by the officer referred to in 30a, otherwise than by forwarding to his superior. The report will accompany the charges. He may act under A. W. 104 after the investigation.

34. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—Submission of and Action Upon Charges—Action by officer exercising court-martial jurisdiction.—He will act under A. W. 104 with reference to such offenses as may properly be disposed of under that article. Specifications and charges thus disposed of, and specifications and charges which are dismissed as trivial or for other reasons, will be lined out and initialed. In order that the meaning of the affidavit to the charges may not be changed, the numerical designations of charges and specifications as set forth in the affidavit will be made to correspond to any renumbering made necessary by the elimination of any specification or charge. Any demand for trial made by an accused (see 107) will be noted and initialed if charges are forwarded.

Charges forwarded or referred for trial and accompanying papers should be free from defect of form or substance, but delays incident to the return of papers for correction of defects that are not substantial will be avoided. Obvious errors may be corrected and the charges may be redrafted over the signatures thereon, provided the redraft does not involve any substantial change or include any person, offense, or matter not fairly included in the charges as received. Corrections and redrafts should be initialed by the officer making them.

He will make or cause to be made any necessary investigation (see 30c), but will not investigate charges signed by himself if another officer is available. If the charges were investigated before reaching him, another investigation need not be made unless there is reason to

believe that further investigation would aid in the administration of justice.

With due regard to the policies of the War Department and other superiors and subject to jurisdictional limitations, charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment. In this connection see 14 as to the authority to cause a capital case to be tried by special court-martial. The objections to referring charges for a serious military offense, such as desertion, to an inferior court should be considered. In this connection it should be remembered that the retention in the Army of thieves and persons guilty of other offenses involving moral turpitude injuriously reflects upon the good name of the service and its self-respecting personnel. Ordinarily a specification as to which the statute of limitations may apparently be successfully pleaded should not be referred for trial.

Action will be taken promptly in any case. See in this connection 26 (Penalty for delay). When a person is held for trial by general court-martial the commanding officer will within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same is not practicable, he will report to superior authority the reasons for delay. (A. W. 70.)

Charges referred for investigation or trial or forwarded should be accompanied by related papers and any available evidence of previous convictions. The matter of forwarding copies of charges and related papers may be regulated by an appointing authority or his superiors; otherwise such copies as will probably be required will, if practicable, accompany the charges. When charges are forwarded a recommendation as to the disposition of the case will be included. In desertion cases a commanding officer should before deciding upon his action or recommendation take into consideration the character and prior service of the accused. He, for instance, should not hesitate in a proper case to recommend restoration to duty. The usual form of indorsement referring charges for trial is shown on the form (App. 3). The signed indorsement referring charges will be on the original charge sheet and may include any proper instructions; for instance, a direction that the charges be tried with certain other charges against the accused or tried with the law member present. Where the only officer present with a command decides to try the charges as summary court-martial of that command no indorsement is required.

35. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—*Submission of and Action Upon Charges—Investigation of charges; reference to staff judge advocate; suspected insanity.*

a. Investigation of Charges—Statutory requirements; introductory statement.—No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides. (A. W. 70.)

No witness shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him. (A. W. 24.)

What follows in this paragraph (35a) is primarily intended to indicate a proper procedure in the more usual cases. Variations to save labor, time, or expense, or designed to meet other cases, or exceptional or local conditions, or for any other good reason, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements quoted above are carried out. The investigation should be prompt, dignified, and military. It should also be as brief as is consistent with thoroughness and fairness, and should, therefore, not include any examination or cross-examination into matters not essential to determine the necessity of trial.

Instructions.—At the outset of the investigation the accused will be informed of the following: The offenses charged against him; the names of the accuser and of the witnesses, as far as then known to the investigating officer; the fact that the charges are about to be investigated; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to make or submit a statement in any form subject to the risk of having such statement used against him.

All available witnesses who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused. Ordinarily application for the

attendance of any witness subject to military law will be made to such witness's immediate commanding officer. The decision of the officer exercising summary court-martial jurisdiction over the command to which the witness belongs as to availability is final. There is no provision for compelling the attendance of or for paying civilian witnesses. Witnesses need not be sworn or required to sign their statements, but either or both will be done if the investigating officer deems such action advisable or is so instructed.

Where the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained by written statement of the witness, interview with the witness, or other similar means, and the accused states that he does not desire to cross-examine such witness, the witness need not be called even if available. Where a witness requested by the accused is available, such witness need not be called if the accused withdraws his request upon being informed that the testimony expected by the accused from such witness will be regarded as having been actually taken.

To the extent required by fairness to the Government and the accused, documentary evidence and statements of nonavailable witnesses will be shown, or the substance thereof will be made known, to the accused.

Unless the investigating officer is required to make a formal report or unless the probable disposition of a case is such that a formal report should be made (e. g., when the investigating officer himself recommends action involving a forwarding of the charges), an informal report is sufficient.

Unless otherwise indicated by him, the submission of his report by an investigating officer will be regarded as a statement to the best of his knowledge and belief that the investigation of the matters set forth in the charges was made in substantial conformity with all requirements; that the matters set forth in the charges on which he recommends trial are true, and that such charges are in proper form.

A formal report by indorsement or letter will include, or carry as inclosures or by reference to other papers returned or submitted by him with the report:

First. His recommendation as to what disposition should be made of the case, and a statement of any reasonable ground for the belief that the accused is, or was at the time of an offense, mentally defective, deranged, or abnormal.

Second. A statement of the substance of the testimony taken on both sides, including any stipulated testimony. e. g., where accused withdraws a request for a witness upon being told that the testimony expected would be regarded as taken.

Third. Any statements, documents, or other matters considered by him in reaching his conclusions or making his recommendations, or copies or the substance of such statements, etc.

An informal report according to circumstances or to instructions of superior authority may be orally made, or made by a brief memorandum indorsement, notations on the charge sheet, or other suitable means, and, however made, need include only the first and second items of the formal report in greatly abbreviated form, but the sources of any material evidence for either side which were not shown in the papers as received by the investigating officer should be reported.

b. Reference to Staff Judge Advocate.—Subject to the provisions of this paragraph (35b) reference to a staff judge advocate will be made and his advice submitted in such manner and form as the appointing authority may direct.

No appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all the information relating to the case, including any report made under 35c, which is reasonably available at the time trial is directed.

The advice of the staff judge advocate shall include a written and signed recommendation of the action to be taken by the appointing authority. Such recommendation will accompany the charges if referred for trial. (See 41d.)

c. Suspected Insanity.—An appointing authority may, in his discretion, suspend action on the charges pending the consideration of the report of one or more medical officers, or the report of a board convened under AR 600-500 in a case where that regulation applies and it is practicable to convene such a board. The medical officers or board will be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should ordinarily be required to include in the report a statement, in as non-technical language as practicable, of the mental condition of the accused both at the time of the offense and at the time of the examination. The appointing authority may, in his discretion, attach the report to the charges if referred for trial or forwarded.

CHAPTER VIII

COURTS-MARTIAL—PERSONNEL

APPOINTMENT—CHANGES IN PERSONNEL—MEMBERS—PRESIDENT—LAW MEMBER

36. COURTS-MARTIAL—PERSONNEL—Appointment.—See 4-6, inclusive, for various matters relating to the appointment of courts-martial, including the detail of a law member, and the appointment of a trial judge advocate, defense counsel, and assistants.

Courts should be assembled at posts or stations where trial will be attended with the least expense and delay.

For forms of appointing orders, see App. 2.

37. COURTS-MARTIAL—PERSONNEL—Changes in personnel.—It is within the discretion of the appointing authority to make changes in the personnel appointed or detailed by him; for instance, he may detail new members or a new trial judge advocate.

In the interest of expeditious and well-conducted trials the proper commanding officer should make timely recommendations to the appointing authority as to relieving or adding members, changing the trial judge advocate, assistant trial judge advocate, defense counsel or assistant defense counsel, or appointing a new court.

38. COURTS-MARTIAL—PERSONNEL—Members.—a. Duties in general; oath.—A member stationed at the place where the court sits is liable to duty with his command during adjournment from day to day.

Members will be dignified and attentive. While a court has no power to punish its members, improper conduct by a member, such as a refusal or failure to vote or properly to discharge any other duty under his oath or otherwise, is a military offense.

Each member has an equal voice and vote with other members in deliberating upon and deciding all questions submitted to a vote or ballot, neither the president nor the law member having any greater rights in such matters than any other member.

Where before trial it appears to a member that he should not sit on the court, either at all or in a particular case, for reasons that will probably not otherwise seasonably come to the attention of the appointing authority, he will take appropriate and timely steps with a view to bringing the matter to the attention of the appointing authority.

See 95 as to oath of members.

b. *New member.*—If after the trial has begun a new member is sworn (opportunity to challenge him having been given), the substance of all proceedings had and evidence taken in the case will be made known to him in open court before the trial proceeds.

c. *Absence of members*—*In general.*—A member of a general or special court-martial who has reason to believe that he will be absent from a session of the court will so inform the trial judge advocate, stating the reason.

Where less than a quorum is present the court can not be organized as such or proceed with a trial. Less than five members (three in the case of a special court-martial) may adjourn from day to day, and where five (three) are present and one is challenged, the remaining four (two) may pass on the challenge.

If the membership of a court-martial is reduced below the minimum required by law, or if the trial judge advocate has good reason to anticipate such a reduction, he will report the facts to the appointing authority. The report by the trial judge advocate of a general court-martial will usually be made through the commanding officer of the post, command, or station where the court is sitting, who will promptly forward it or the substance thereof and the names of an appropriate number of officers available and suitable for detail.

The principles of 386 apply when a member, on account of absence during a trial, misses part of the proceedings.

Absence of law member.—In case of the absence of the law member from, or at any time during, the trial of a case that has been specifically directed to be tried with the law member present, the court will not proceed with the trial until either the law member is present or such direction is revoked; and will, if the circumstances so require, cause a report of the facts to be made to the appointing authority. Where it has not been specifically directed that a case be tried with the law member present the court need not, a quorum being present, discontinue trial on account of his absence. The specific direction referred to and any revocation thereof should as a rule be in writing.

39. COURTS-MARTIAL—PERSONNEL—President.—The senior in rank among the members present is the president and presiding officer of the court.

As president, and subject to the direction of the court, he maintains order, gives the directions necessary for the regular and proper conduct of the proceedings, takes proper steps to expedite the trial of all charges referred for trial; and, unless otherwise provided, speaks and acts for the court in every instance where a rule of action has been prescribed by law, regulation, or its own resolution, and authenticates by his signature all acts, orders, and proceedings of the

court. With reference to his duty to rule on interlocutory questions, see 51c.

As a member he has the duties, powers, and privileges of members in general.

40. **COURTS-MARTIAL—PERSONNEL—Law member.**—As law member his principal duty is to rule upon interlocutory questions. See 51d. As a member he has the duties, powers, and privileges of members in general.

the court nor the accused may be in doubt at any time as to the offense to which the evidence being introduced refers.

If he finds that the provisions of this manual are not sufficiently specific clearly to settle a question likely to arise at the trial, he should endeavor to secure for use at the trial authorities (such as pertinent decisions of the courts or authoritative military precedents) to sustain his contentions. To the end of securing such authorities, he may communicate with or consult the appointing authority.

If, while preparing a case for trial, he discovers a matter, which in his opinion makes it inadvisable to bring the case to trial, he will at once bring such matter to the attention of the appointing authority, provided it is reasonably apparent that such matter was not known to the appointing authority when the charges were referred for trial. Such action would be appropriate where, for example, the trial judge advocate discovers evidence that the accused was or is insane, or finds that the only witness to an essential fact has disappeared or repudiates the substance of the testimony expected from him.

d. Duties during trial.—He executes all orders of the court. Under the direction of the court he keeps or superintends the keeping of the required record of the proceedings. He signs the record of each day's proceedings.

While his primary duty is to prosecute, any act (such as the conscious suppression of evidence favorable to the defense) inconsistent with a genuine desire to have the whole truth revealed is prohibited.

While the court is in open session, he should respectfully call its attention to any apparent illegalities or irregularities in its action or in the proceedings.

He will take care that any papers in his possession which relate to a case referred to him for trial and which are not in evidence, are not exposed to any risk of inadvertent examination by members of the court.

Aside from opinions expressed in the proper discharge of his duty to prosecute (e. g., in an argument on the admissibility of evidence), he should not give the court his opinion upon any point of law arising during the trial except when it is asked for by the court in open court. When he addresses the court he will rise. The court may require him to reduce his arguments to writing.

e. Relations to the accused and his counsel.—Except to the extent that this manual may otherwise require, it is not his duty to assist or advise the defense.

Immediately on receipt of charges referred to him for trial he will serve a copy of the charge sheet as received and corrected by him on the accused and will inform the defense counsel of the court

that such copy has been so served. Except as otherwise directed by the appointing authority, he will permit the defense to examine from time to time any papers accompanying the charges, including papers sent with charges on a rehearing. He will also permit the defense to examine from time to time the orders appointing the court and all modifying orders.

Ordinarily his dealings with the defense will be through any counsel the accused may have. Thus if he desires to know how the accused intends to plead he will ask the defense counsel or other counsel, if any, of the accused. He should not attempt to induce a plea of guilty.

The defense will be allowed to read the record as it is written up, except unannounced findings and sentence; and the trial judge advocate of a general court-martial will furnish every person tried by the court who desires one a copy of the record of trial, less unannounced findings and sentence and exhibits not copied. See in this connection 46b (Preparation of carbon copies); 48 (Clerks and orderlies); and 85b (Receipt or certificate of delivery).

42. COURTS-MARTIAL—PERSONNEL—Assistant Trial Judge Advocate.—a. Duties in general.—An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. (A. W. 116.) He will perform such duties in connection with trials as the trial judge advocate may designate. See App. 5 for suggestions as to appropriate duties and 95 as to oath.

b. Term "trial judge advocate" includes assistant.—Wherever in this manual the trial judge advocate of a general court-martial is mentioned the term will be understood to include assistant trial judge advocates, if any, unless the context shows clearly that a different sense is intended.

43. COURTS-MARTIAL—PERSONNEL—Defense Counsel.—a. Selection; relief; absence.—He will be carefully selected.

When it appears to the president of the court or to the defense counsel himself that the latter is for any reason, including bias, prejudice, or hostility in a particular case, disqualified or unable properly and promptly to perform his duties, the facts will be reported at once to the appointing authority through appropriate channels. For a proper reason (e. g., preparation of another case) the court, if in session, otherwise the president, may with the consent of the accused excuse from attendance during the trial such of the personnel of the defense as will not be required.

b. Duties.—When the defense is not in charge of a counsel of the accused's own selection, the duties, etc., of the defense counsel are

those of a military counsel of the accused's own selection. (See 45.)

When the defense is in charge of a counsel of the accused's own selection, civil or military, the duties of the defense counsel as associate counsel are such as the selected counsel may designate.

Immediately upon charges being referred for trial to the court he will inform the accused of that fact and of his rights as to counsel, and will render the accused any desired assistance in securing and in consulting counsel of his own selection. Unless the accused otherwise desires the defense counsel will undertake the defense without waiting for the appointment or the retaining of any individual counsel.

c. Term "counsel for the accused."—Whenever the phrase "counsel for the accused," or any similar phrase, is used in this manual it is to be understood, unless the context indicates otherwise, as including the defense counsel of the court and any individual counsel.

44. COURTS-MARTIAL—PERSONNEL—Assistant Defense Counsel.—a. Duties.—An assistant defense counsel shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused. (A. W. 116.) Unless in charge of the defense, he will perform such duties in connection with the trial as the counsel in charge of the defense may designate.

b. Term "defense counsel" includes assistant.—Whenever in this manual the defense counsel of a general court-martial is mentioned, the term will be understood to include an assistant defense counsel, if any, unless the context shows clearly that a different sense is intended.

45. COURTS-MARTIAL — PERSONNEL — Individual Counsel for the Accused.—a. Statutory rights of accused; detail of individual counsel.—The accused shall have the right to be represented in his defense before the court (general or special court-martial) by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to A. W. 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel. (A. W. 17.) Civilian counsel will not be provided at the expense of the Government.

Application, through the usual channels, for the detail of a person selected by the accused as military counsel may be made by the accused or anyone on his behalf. When the application reaches an officer who is authorized to make the detail and order any necessary travel, he will act thereon. His decision is subject to revision by his immediate superior on appeal by or on behalf of the accused.

b. Duties in general; freedom in conducting defense.—An officer, or other military person, acting as individual counsel for the accused before a general or special court-martial, will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in or in connection with the case which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence. It is improper for him to assert in argument his personal belief in the accused's innocence or to tolerate any manner of fraud or chicanery.

With a view to saving time, labor, and expense, he should join in appropriate stipulations as to unimportant or uncontested matters. See 126 (Stipulations).

Before the trial he will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence after such plea (see 70); his right to testify or to remain silent (see 120*d* and 121*b*); his right to make a statement, (see 76); his right to introduce evidence in extenuation (see 111); and, in an appropriate case, his right to plead the statute of limitations (see 67 and 78). These explanations will be made regardless of the intentions of the accused as to testifying, making a statement, or as to how he will plead.

His preparation for trial should include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, to the end that such evidence as he proposes to introduce in defense may be confined to relevant evidence, and that he may be ready to make appropriate objection to any irrelevant evidence that might be offered by the prosecution. In determining the order in which he proposes to introduce evidence for the defense, he should observe the general principle stated in the third subparagraph of 41*c*.

The fourth subparagraph of 41*c* applies equally to him.

He will examine the record of the proceedings of the court before it is authenticated.

The court will avoid any unwarranted interference in his conduct of the defense, but may require him to reduce his arguments to writing. When he addresses the court he will rise.

Ample opportunity will be given him and the accused properly to prepare the defense, including opportunities to interview each other and any other person.

Where the trial proceeds after the accused has escaped, the individual counsel continues to represent him.

46. COURTS-MARTIAL—PERSONNEL—Reporter.—*a. Authority for appointment or detail.*—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter. (A. W. 115.)

Enlisted men may be detailed to serve as stenographic reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards. (Act of August 24, 1912, 37 Stat. 575.)

Subject to such exceptions as may be made by appointing authorities, and within the limitations of the statutes quoted above, the appointment of reporters or the detail of enlisted men to serve as stenographic reporters is hereby authorized, except for summary courts-martial and except for special courts-martial, when the appointing authority does not direct that the testimony be reduced to writing.

In the appointment of civilian reporters, among applicants equally qualified, preference will be given to former members of the armed forces of the United States, who have been honorably discharged therefrom, and to their widows, and also to the wives of any such honorably discharged former members of the armed forces of the United States, who have been injured and are not themselves qualified, but whose wives are qualified to hold such positions.

b. Duties; oath; compensation.—He shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. (A. W. 115.) If a question is raised as to whether any particular matter is included in the term, "proceedings of and testimony taken," the court will determine the question in accordance with applicable law and regulations.

He will be required to discharge his duties as promptly as practicable under the circumstances. He will prepare one carbon copy of the typewritten parts of general court-martial record, and such additional carbon copies thereof as may be required by the trial judge advocate, not exceeding the number authorized by the appointing authority.

See 95 as to oath, and AR 35-4120 as to compensation.

47. COURTS-MARTIAL — PERSONNEL — Interpreter.—*a. Authority for appointment.*—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter. (A. W. 115.) Interpreters may be employed

for courts-martial whenever necessary without application to the appointing authority.

b. Duties; oath; compensation.—He shall interpret for the court. (A. W. 115.)

In questioning a witness through an interpreter the question should be put in the same form as when questioning a witness not through an interpreter. Thus, ask "What is your name?" instead of telling the interpreter to ask the witness what his name is.

The interpreter should translate questions and answers as given to him. Thus, if the question is "What is your name?" that question should be asked in the language of the witness, and the interpreter should not use such a form as "They want to know what your name is."

Sec 95 as to oath, and AR 35-4120 as to compensation.

48. COURTS-MARTIAL—PERSONNEL—Clerks and Orderlies.—When necessary the commanding officer will detail suitable soldiers as clerks and as orderlies to assist the trial judge advocate and counsel for the accused.

CHAPTER X

COURTS-MARTIAL—PROCEDURE

CERTAIN GENERAL MATTERS—CLOSED SESSIONS—INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES—CONTINUANCES

49. COURTS-MARTIAL — PROCEDURE — Certain General Matters.—a. Order of proceedings.—The chronological order of the usual proceedings in trials by general and special courts-martial is indicated in the forms of records given in App. 6 and App. 7, respectively; and as far as practicable the discussion in the chapters on procedure herein follows the same order.

b. Proceedings in each case to be complete.—In each case the proceedings must be complete without reference to any other case. For example, in each case tried opportunity to challenge must be given and the required oaths administered.

c. Joint trials.—In a joint trial each of the accused must in general be accorded every right and privilege which he would have if tried separately, but needless repetition may be avoided by the use of appropriate general language.

d. Reference to appointing authority.—Whenever a matter as to future proceedings in a case is referred to the appointing authority by or on behalf of a general court-martial such authority will refer the matter to his staff judge advocate for consideration and advice.

e. Excluding spectators.—Subject to the directions of the appointing authority, a court-martial is authorized either to exclude spectators altogether or to limit their number. In the absence of a good reason, however (e. g., where testimony as to obscene matters is expected), courts-martial will sit with doors open to the public.

f. Opportunity to present and support contentions.—Both sides are entitled to an opportunity properly to present and support their respective contentions upon any question or matter presented to the court for decision; but the right should not be abused, and the court may in its discretion limit, or even refuse to hear, argument when it is manifest that such argument is trivial, mere repetition, or made solely for the purpose of delay. As to oral and written arguments, see 77.

g. Explanation of accused's rights.—Whenever deemed necessary the court will cause to be clearly explained to the accused any right which he appears not fully to understand.

50. COURTS-MARTIAL—PROCEDURE—Closed Sessions.—The clearing and closing of a general or special court-martial is impliedly or expressly required by statute (A. W. 19, A. W. 31), during the deliberation and voting upon the findings and sentence and upon interlocutory questions, including challenges. See, however, 58f (Procedure on challenge).

Whenever the closing or opening of the court is required, the president will announce such closing or opening.

When the court is closed, all persons except the members who are to vote on the matter will withdraw, unless such members withdraw to another room for the closed session. See A. W. 30 in this connection.

51. COURTS-MARTIAL—PROCEDURE—Interlocutory Questions Other Than Challenges.—*a. Statutory provisions.*—The law member of the court, if any, or if there be no law member of the court then the president, may rule in open court upon interlocutory questions, other than challenges, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of the court, if any member object thereto, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial and any member object to the ruling the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank. (A. W. 31.)

b. Applicability of this paragraph.—This paragraph (51) applies to all interlocutory questions arising during the proceedings (i. e., all questions other than the findings and sentence) except the question whether or not a challenge shall be sustained. Any statement or indication in this manual to the effect that a certain question is to be decided by the court (see, for example, 46b) is not to be understood as making an exception to the foregoing rule.

c. Rulings by the president.—The president of a general court-martial, in the absence of the law member of the court, and the president of a special court-martial in all cases will rule in open court upon all interlocutory questions other than challenges arising during the proceedings, such as questions as to the admissibility of evidence offered during the trial, incompetency of witnesses, continuances, adjournments, recesses, motions, order of the introduction of witnesses, and the propriety of any argument or statement of counsel or trial judge advocate. If a member objects to the ruling of the president upon the question, the court shall be cleared and closed and the question voted on as stated in 51f.

d. Rulings by law member.—The law member of a general court-martial, whenever present, will, instead of the president, rule in open court on all interlocutory questions other than challenges arising during the proceedings.

On an objection to the admissibility of evidence offered during the trial his ruling is final in so far as concerns the court, and no repetition of the ruling or announcement of its finality is necessary. Rulings of the law member upon other questions are likewise final, unless objected to by a member of the court. Upon such objection the court will be cleared and closed, and the question decided as stated in 51f.

As to what is not included in the phrase "objection to the admissibility of evidence offered during the trial," see A. W. 31.

e. Form of rulings.—Each ruling by the president, and each ruling of the law member which is subject to objection, should be prefaced by some such statement as "subject to objection by any member."

f. Voting on.—When voting on any interlocutory question other than a challenge the members of the court shall vote orally beginning with the junior in rank, and the question shall be decided by a majority vote. (A. W. 31.) If there be a tie vote on any objection, motion, request, etc., the objection, motion, request, etc., is overruled or denied. The voting is in closed session, but the president announces the decision in open court.

g. Necessary inquiry to be made—Preponderance of evidence controls.—The ruling or decision should be preceded by any necessary inquiry into the pertinent facts and law. Upon such inquiry questions of fact are determined by a preponderance of evidence. While the responsibility of making a ruling devolves upon the law member or president, as the case may be, he may properly ask that the court close, in order to permit him to consult with the other members of the court before making his ruling.

52. COURTS-MARTIAL — PROCEDURE — Continuances.—*a. Statutory provision; number of; postponement, etc., in lieu of continuance.*—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just. (A. W. 20.)

There is no limit to the number of continuances which may be granted. Any necessity for formal continuance may often be obviated by requesting the president to postpone the assembling of the court or by requesting the court to adjourn or to take a recess.

b. Grounds for; effect of denying.—Among the grounds that may be considered as reasonable are the absence of a material witness; sickness of the trial judge advocate, accused, counsel, or witness; insufficient time to prepare for trial; and a pending prosecution in a civil court based on the same act or omission.

A failure by the trial judge advocate to cause a copy of the charges to be served as required may be a ground for a continuance; and in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. (See A. W. 70.)

The refusal by a court to grant a continuance where a reasonable cause is shown will not nullify the proceedings, but may be good ground for directing a rehearing.

c. Application and action thereon.—Application should be made to the court if in session; otherwise to the appointing authority; but an application to the court for an extended delay, if based on reasonable cause, may be referred by the court to the appointing authority.

The proper time for making an application to the court is after the accused is arraigned and before he pleads. The court may defer until after arraignment action on an application made before arraignment, and should so defer action whenever it appears that the granting of a continuance before arraignment may involve a risk of the trial of an offense being barred by the statute of limitations. (See 67.)

Reasonable cause for the application must be alleged. For instance, when a continuance is desired because of the absence of a witness, the application should show that the witness is material, that due diligence has been used to procure his testimony or attendance, that the party applying for the continuance has reasonable ground to believe that he will be able to procure such testimony or attendance within the period stated in the application, the facts which he expects to be able to prove by such witness, and that he can not safely proceed with the trial without such witness.

In general the facts as set forth in the application may be accepted as substantially true; but if long or repeated delay is involved, or the facts are disputed or improbable, or any other good reason exists, the applicant may be required to furnish further proof. On any issue of law or fact arising in the proceedings on an application for a continuance, both parties will be given an opportunity to present evidence and make an argument.

An application based on the absence of a witness may be denied where the opposite party is willing to stipulate that the absent witness would testify as stated in the application, unless it clearly appears that such denial would be prejudicial.

CHAPTER XI

COURTS-MARTIAL—PROCEDURE

(Continued)

ASSEMBLING—SEATING OF PERSONNEL AND ACCUSED—ATTENDANCE AND SECURITY OF ACCUSED—INTRODUCTION OF THE ACCUSED AND COUNSEL; SWEARING REPORTER; ASKING ACCUSED AS TO COPY OF GENERAL COURT-MARTIAL RECORD; ANNOUNCEMENT OF MEMBERS PRESENT

53. COURTS-MARTIAL — PROCEDURE — Assembling.—A general or special court-martial assembles at its first session in accordance with the order convening it; thereafter according to adjournment. When, as is usually the case, the appointing order, after stating the hour and date of the first meeting, adds the words "or as soon thereafter as practicable"; or when, as is often the case, the court adjourns to meet at the call of the president, or whenever advisable or necessary for any reason, the president of the court will fix the hour and date for the first or subsequent meeting, as the case may be, and seasonably notify the trial judge advocate in order that proper notice of the meeting (see 41c) may be sent out.

54. COURTS-MARTIAL—PROCEDURE—Seating of Personnel and Accused.—When the court is ready to proceed, it is called to order by the president. Members will be seated according to rank alternately to the right and left of the president, except that the law member will be seated on the immediate left of the president. If the rank of a member is changed, he will sit according to his new rank. Subject to change by the court, other personnel and the accused will be seated as the president directs, except that the accused will be permitted to be near his counsel.

55. COURTS-MARTIAL—PROCEDURE—Attendance and Security of Accused.—The appointing authority or the post commander or other proper officer in whose custody or command the accused is at the time is responsible for the attendance of the accused before the court.

The presence of the accused throughout the proceedings in open court is, unless otherwise stated (e. g., 10, Effect of escape, and 83. Revision), essential.

Neither the court nor the trial judge advocate as such is responsible for or has any authority in connection with the security of a prisoner being tried, and neither the court nor the trial judge advocate as such

has any control over the imposition or nature of the arrest or other status of restraint of an accused, except that the court does have control over the accused in so far as his personal freedom in its presence is concerned; but the court or the trial judge advocate may make recommendations to the proper authority as to these matters.

56. COURTS-MARTIAL—PROCEDURE—Introduction of the Accused and Counsel; Swearing Reporter; Asking Accused as to Copy of General Court-Martial Record; Announcement of Members Present.—A quorum and the accused being present, the trial judge advocate will announce the name of the accused, and, at the first session in a trial, ask the accused whom he desires to introduce as counsel. Any change in counsel during the trial should be brought to the attention of the court in a similar manner. The court should, whenever the occasion requires, take appropriate action to the end that the accused, if he so desires, will be represented in his defense before the court as contemplated by A. W. 17.

After the introduction of the accused and his counsel the reporter will be sworn (see 95, Oath), and the accused, in the case of trial by general court-martial, will be asked if he desires a copy of the record of trial.

At the first session in a trial the trial judge advocate will announce the names of the members present. Similar announcement will be made when a new member appears or a member resumes his seat after an absence.

During the introduction of the accused and his counsel and the naming of the members present, the accused and the personnel of the prosecution and defense will stand.

CHAPTER XII

COURTS-MARTIAL—PROCEDURE

(Continued)

EXCUSING MEMBERS—CHALLENGES—WITNESS FOR THE PROSECUTION—ACCUSER—OATHS—ARRAIGNMENT

57. COURTS-MARTIAL—PROCEDURE—Excusing Members.—*a. Disclosing grounds for challenge.*—After announcing the names of the members present, the trial judge advocate will disclose in open court every ground of challenge believed by him to exist in the case, and will request that each member do likewise with respect to such grounds of challenge whether against the member himself or any other member. The trial judge advocate will give such information to the court as to the general nature of the charges, who signed them, and who participated in the proceedings already had thereon as may be requested by the accused, his counsel or any member.

Similar disclosure and request will be made by the trial judge advocate with respect to a new member before he is sworn; and the trial judge advocate or any member will disclose any such ground at any time during the proceedings that he becomes aware of it.

b. Action upon disclosure.—If it appears from any such disclosure that a member is subject to challenge on any ground stated in clauses first to fifth of 58*e*, and the fact is not disputed, such member will be excused forthwith. Except as just stated, no action is required under this paragraph (57*b*), with respect to any disclosures that may be made; but proceedings under this paragraph are without prejudice to any rights of challenge of either side.

58. COURTS-MARTIAL—PROCEDURE—Challenges.—*a. Statutory provisions.*—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge, but the law member of the court shall not be challenged except for cause. (A. W. 18.)

b. Who subject to; who may challenge.—Only the members of a general or special court-martial are subject to challenge, and they may be challenged only by the trial judge advocate and the accused.

c. When made; reconsideration; opportunity to challenge new member.—Challenges should be made before the arraignment, but the court may permit a challenge for cause to be presented at any stage of the proceedings. A challenge will be so permitted if the challenger has exercised due diligence or if the challenge is based on any of the grounds stated in clauses first to fifth of 58e.

The fact that a particular challenge for cause has been adversely determined does not preclude the court from again entertaining it if good cause, such as newly discovered evidence, is shown. Full and timely opportunity will be given to challenge every new member.

d. Peremptory challenges.—A peremptory challenge does not require any reason or ground therefor to exist or to be stated and may be used before, after, or during the challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member, but can not be used against the law member.

In a joint trial all the accused constitute the "side" (A. W. 18) of the defense and are entitled to but one peremptory challenge.

e. Challenges for cause.—*Grounds for.*—Among the grounds of challenge for cause are:

First: That he (the challenged member) is not competent or is not eligible to serve on courts-martial.

Second: That he is not a member of the court.

Third: That he is the accuser as to any offense charged.

Fourth: That he will be a witness for the prosecution.

Fifth: That (upon a rehearing) he was a member of the court which first heard the case.

Sixth: That he personally investigated an offense charged as member of a court of inquiry or otherwise.

Seventh: That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.

Eighth: That he will act as reviewing authority or staff judge advocate on the case.

Ninth: Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples: That he will be a witness for the defense; that he testified or submitted a written statement on the investigation of the charges, unless at the request of the accused; that he has officially expressed an opinion as to the mental condition of the accused; that he is a prosecutor as to any offense charged; that he has a

direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record. See in connection with this last example paragraph 38*b* and the fourth subparagraph of 38*c*.

f. Procedure.—After the challenges, if any, presented by the trial judge advocate have been disposed of, he will, after complying with any request made by the accused to be permitted to examine the papers and orders referred to in 41*e*, give the accused an opportunity to exercise his rights as to challenge. The accused thereupon challenges in turn each member to whom he objects. As to peremptory challenges, see 58*d*. Full and timely opportunity will be given to the accused, including each accused in a joint trial, to exercise his right of challenge.

A challenge may be withdrawn by the challenger for any reason; e. g., where the challenged member makes a statement or reply which is satisfactory to the challenger. A challenge on the ground stated in the last example in the ninth clause of 58*e* will often be withdrawn by the challenger upon his being informed that certain witnesses will be recalled and reexamined.

Where a member is challenged on the ground that he is the accuser and admits the fact, or where a member is peremptorily challenged, or where, in any case, it is manifest that a challenge will be unanimously sustained, the member may be excused forthwith if no objection or question is made or raised; otherwise the challenge, if not withdrawn, must be passed on by the court after both sides have been given an opportunity to introduce evidence and to make an argument. The challenger may subject the challenged member to an examination under oath as to his competency as a member. For form, etc., of oath, see 95. During deliberation and voting on a challenge the court will be closed.

Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.

Vote upon the challenge is by secret written ballot, which ballot may be in the form "sustained" or "not sustained." See A. W. 31 as to counting and checking vote and announcing the result of the ballot; and A. W. 19 as to disclosing or discovering the vote or opinion of any particular member upon a challenge. Deliberation on the challenge may properly include full and free discussion. The influence of superiority in rank should not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment. A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge. A tie vote on a challenge is a vote in the negative, and the challenge is not sustained. Upon the court being opened the president shall state in open court that the challenge has been sustained or not sustained as the case may be.

The challenged member will take no part as such in the hearings, deliberations, and voting upon a challenge against him. If the challenge is sustained, the challenged member will withdraw, otherwise he will resume his seat. With reference to action on a challenge by a court reduced below a quorum, see 38c.

59. COURTS-MARTIAL—PROCEDURE—Witness for the Prosecution.—

If at any stage of the proceedings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member in the case. Whether a member called as a witness for the court is to be considered as a witness for the prosecution depends on the character of his testimony. In case of doubt he should be excused as a member. Where a witness called by the defense testifies adversely to the defense, he does not thereby become a "witness for the prosecution."

60. COURTS-MARTIAL—PROCEDURE—Accuser.—An officer who has signed and sworn to the charges in a particular case is necessarily an accuser in that case. But while prima facie the person who signs and swears to the charges is the only accuser in the case, that is not always true. There may be another or others who are real accusers. (See 5.)

61. COURTS-MARTIAL—PROCEDURE—Oaths.—After the proceedings as to challenges are concluded the members of the court, trial judge advocate, and each assistant trial judge advocate are sworn. (See 95 as to oaths.) The organization of the court is then complete and it may proceed with the trial of the charges in the case then before the court.

62. COURTS-MARTIAL—PROCEDURE—Arraignment.—The court being organized and both parties ready to proceed, the trial judge advocate will read the charges and specifications, including the signature of the accuser, to the accused, and then ask the accused how he pleads

to each charge and specification. This proceeding constitutes the arraignment. The pleas are not part of the arraignment. The fact that the service of the charges was within five days of the arraignment (see A. W. 70) does not prevent the arraignment even though the accused objects on that ground to the proceeding, but such fact is available as a ground of valid objection to any further proceedings in the case at that time. As to deferring action on an application for a continuance until after arraignment, see 52c.

During the arraignment, the accused and the personnel of the prosecution and defense will stand. With the consent of the court the accused may waive the reading of the charges and specifications.

The order pursued in case of several charges and specifications, as a rule, will be to arraign on the first, second, etc., specification to the first charge, then on the first charge, and so on with the rest.

After the members have been sworn to try and determine "the matter now before" them, additional charges, which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, can not be introduced or the accused required to plead thereto. But if all the usual proceedings prior to arraignment are first had with respect to such additional charges, including proceedings as to excusing and challenging members and administering oaths, such charges may be introduced, the accused may be arraigned on them, and the trial may proceed on both sets as the trial of one case. In such a case an application for a reasonable continuance should be granted.

CHAPTER XIII

COURTS-MARTIAL—PROCEDURE

(Continued)

INQUIRY INTO SANITY OF ACCUSED—PLEAS—MOTIONS—NOLLE PROSEQUI—ACTION ON DEFECTIVE SPECIFICATION—ACTION WHERE EVIDENCE INDICATES AN OFFENSE NOT CHARGED

63. COURTS-MARTIAL—PROCEDURE—Inquiry into Sanity of Accused.—

The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense. For instance, the actions and demeanor of the accused as observed by the court or the bare assertion from a reliable source that the accused is believed to be insane may be a sufficient reason. It should be remembered, however, that while a person who is insane to the extent indicated above should not be tried, nevertheless, until the contrary is shown, a person is presumed to be sane, and a mere assertion that a person is insane is not necessarily and of itself enough to impose any burden of inquiry on the court.

The request, suggestion, or motion that such an inquiry be had may be made by any one of the personnel of the court, prosecution, or defense. If such an inquiry is determined upon, priority will be given to the determination of the matter, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that such inquiry may be a long and expensive proceeding, or if the court desires to hear competent expert testimony, the court may adjourn and report the matter to the appointing authority with its recommendation in the premises. Such recommendation may include in a proper case a recommendation that the accused be examined as indicated in 35c, and that the officer or officers, or some of them, conducting the examination be made available as witnesses.

If the court finds that the accused is insane, the proceedings so far as had embodying the finding to that effect will be forwarded to the reviewing authority; otherwise the trial proceeds.

64. COURTS-MARTIAL—PROCEDURE—Pleas.—a. General matters.—

Pleas in court-martial procedure include plea to the jurisdiction, plea in abatement, plea in bar of trial, and pleas to the general issue. The first three are known as special pleas.

One plea may be entered as applicable to all or to certain specified charges and specifications; e. g., "Not guilty to all charges and specifications." The court should ordinarily grant an application not manifestly made in bad faith to change or modify a plea.

The court may reconsider its action in overruling or sustaining a special plea as long as the case is before the court.

The overruling of a special plea does not prevent the entering of another or other special pleas to the same specification or charge, but if practicable special pleas should be entered in the order in which they are stated above.

Except as otherwise indicated in the discussion of special pleas, an accused will not be asked or required to plead further to a specification or charge as long as the action of the court in sustaining a special plea thereto stands; but when all the special pleas entered to a given charge or specification are overruled, the accused should plead to the general issue. With reference to a refusal to plead, see 70 (Pleas to the general issue).

Notwithstanding the action of the court on special pleas or other similar objections, the trial may proceed in the usual course as long as one or more specifications and charges remain as to which a plea to the general issue may be made or stands. For example, when pleas in bar are sustained to all but one specification and charge, to which the plea is not guilty, the trial on that specification and charge may continue. But where, as a result of the action of the court on special pleas or other similar objections, the trial can not proceed further, the court adjourns and submits the record of its proceedings as far as had to the reviewing authority. If the reviewing authority disagrees with the court, he may return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its action with respect to the matters as to which he is not in accord with the court. To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case. The order returning the record should include an appropriate direction with respect to proceeding with the trial. If the reviewing authority does not wish to return the record, he will take other appropriate action.

A special plea should briefly and clearly set forth the nature and grounds of the objection which it is intended to raise. The sub-

stance of the plea and not the designation given to it will control; for instance, if an accused enters a plea, which he calls a plea in abatement, but which in fact raises an objection to trial on jurisdictional grounds, the plea will be considered as a plea to the jurisdiction.

Except as otherwise indicated in the discussion of special pleas, the burden of supporting a special plea by a preponderance of proof rests on the accused. With the same exception, a plea to the general issue may be regarded as a waiver of any objection then known to the accused which is not asserted by a special plea. Thus, a plea to the general issue may be regarded as waiving an objection based on a misnomer of the accused, whether under an alias or otherwise. Any objection which might be asserted by a special plea may if not asserted be brought to the attention of the accused by the court.

Before passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument. A decision on a special plea is a decision on an interlocutory question.

Except as to matters covered by a plea of guilty, a plea admits nothing as to the jurisdiction of the court and nothing as to the merits of the case. Any admission involved in a plea of guilty to any offense has effective existence as such only as long as that plea stands.

The accused has a perfect legal and moral right to enter a plea of not guilty even if he knows he is guilty. This is so because his plea of not guilty amounts to nothing more than a statement that he stands upon his right to cast upon the prosecution the burden of proving his alleged guilt.

b. Inadmissible pleas.—Such objection as that the accused, at the time of the arraignment, is undergoing a sentence of a general court-martial; or that, owing to the long delay in bringing him to trial, he is unable to disprove the charge or to defend himself; or that his accuser was actuated by malice or is a person of bad character; or that he was released from arrest upon the charges, are not proper subjects for special pleas, however much they may constitute grounds for a continuance, or affect the questions of the truth or falsity of the charge, or of the measure of punishment. The same is true in general as to objections that are solely matters of defense under the general issue. (Winthrop.)

65. COURTS-MARTIAL—PROCEDURE—Pleas—Plea to the jurisdiction.—This plea may be based on an absence of any of the conditions stated in 7. An objection to which a plea to the jurisdiction is applicable can not be waived and may be asserted at any time.

66. COURTS-MARTIAL—PROCEDURE—Pleas—Pleas in abatement.—A plea in abatement is one that operates merely to delay the trial and

is based upon some objection to a charge or specification in matters of form only; such as an objection to the specification as inartificial, indefinite, or redundant; or as misnaming the accused; or as containing insufficient allegations of time or place.

If the plea is sustained, the court will, according to circumstances, either direct that the specification be stricken out and disregarded or permit the specification to be amended so as to obviate the objection. In the latter event an application of the defense for a reasonable continuance should be granted unless it is obvious that a denial of the application will not injuriously affect the substantial rights of the accused.

67. COURTS-MARTIAL—PROCEDURE—Plea—Plea in bar of trial; statute of limitations.—Exemption from liability to be tried or punished by a court-martial for all but a few crimes or offenses may be claimed after two (or three) years with certain limitations. See A. W. 39. App. 1. and notes thereunder.

The period of limitation begins to run on the date of the commission of the offense. Absence without leave (A. W. 61); desertion (A. W. 58); and fraudulent enlistment (A. W. 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself, or deserts, or first receives pay or allowances under the enlistment.

In applying this statute the court will be guided by the crime or offense as described in the specification, and not by the Article of War stated in the charge under which the specification is placed. Thus, where an offense properly chargeable under A. W. 93 is erroneously charged under A. W. 96, the limitation is three instead of two years.

If it appears from the charges themselves that the statute has run against an offense charged or (in the case of a continuing offense), a part of an offense charged, the court may bring the matter to the attention of the accused and advise him (through the president, or the law member, if the president so directs) of his right to plead the statute. This action should, as a rule, be taken at the time of arraignment.

With respect to pleading this statute in bar of punishment, see 78a (Statute of limitations).

The burden is not on the defense to show that neither absence nor other impediment prevents the accused from claiming exemption under A. W. 39. For example, if it appears from the charges in a peace-time desertion case that more than three years have elapsed between the date of the commission of the offense and the date of arraignment, the plea should be sustained, unless the prosecution shows by a preponderance of evidence that the statute does not apply

owing to the existence of periods which under the second proviso of A. W. 39 are to be excluded in computing the three years.

68. COURTS-MARTIAL—PROCEDURE—Pleas—Pleas in bar of trial; former trial.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority, shall have taken final action upon the case. (A. W. 40.)

A person has not been "tried" in the sense of A. W. 40 if the proceedings were void for any reason, such as a lack of jurisdiction to try the person or the offense.

The same acts constituting a crime against the United States can not, after acquittal or conviction of the accused in a civil or military court deriving its authority from the United States, be made the basis of a second trial of the accused for that crime in the same or in another such court without his consent. The civil courts in the Territories and in Puerto Rico, the Canal Zone, and the Philippine Islands, as well as the district and other courts of the United States, derive their authority from the United States. The same acts when committed in a State may constitute two distinct offenses, one against the United States and the other against the State. In such a case trial for either does not bar trial for the other.

In general, once a person is tried in the sense of A. W. 40 for an offense, he can not without his consent be tried for another offense if either offense is necessarily included in the other. Thus, a trial for manslaughter may be pleaded in bar of trial for the same homicide charged as murder, and the trial of an enlisted man for absence without leave (A. W. 61) bars trial for the same absence charged as desertion and vice versa if the same enlistment is involved in both cases. Thus, when a soldier deserts and reenlists, trial for absence without leave or desertion from the second enlistment does not bar trial for desertion from the first enlistment although the same period of time may in part be involved in both cases.

Subject to the rules as to documentary evidence, including the rules as to the use of copies, proof of former trial by court-martial and civil court may be, respectively, by the order publishing the case (or by the record of trial if no order was published or the order is not sufficiently explicit), and by the indictment and record of conviction or acquittal.

69. COURTS-MARTIAL—PROCEDURE—Pleas—Miscellaneous pleas in bar of trial.—a. Pardon.—A pardon is an act of the President which exempts the individual on whom it is bestowed from the punishment

the law inflicts for a crime he has committed. A pardon may be pleaded in bar of trial. The usual rules as to documentary evidence apply to a written pardon, whether in the nature of an individual pardon, or of a general amnesty, or the like. If the document is not sufficiently explicit to determine whether or not the plea should be sustained, other evidence must be introduced to fill the gap. In the case of a constructive pardon, facts and circumstances constituting such pardon must be proved.

b. Constructive Condonation of Desertion.—An unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates.

c. Former Punishment.—Punishment under the 104th Article of War may be pleaded in bar of trial. Such punishment, however, does not bar trial for another crime or offense growing out of the same act or omission. For instance, punishment under A. W. 104 for reckless driving would not bar trial for manslaughter where the reckless driving caused a death.

d. Promised Immunity.—See 120*d* (Testimony of accomplices).

70. COURTS-MARTIAL—PROCEDURE—Pleas—Pleas to the general issue.—These pleas include the following: Guilty, not guilty; and pleas corresponding to permissible findings. See 78 (Findings). Should an accused enter a contradictory plea such as guilty without criminality or guilty to a charge after pleading not guilty to all specifications thereunder, such contradictory plea will be regarded as a plea of not guilty.

The court shall proceed to trial and judgment as if he had pleaded not guilty when an accused fails or refuses to plead or answers foreign to the purpose. (A. W. 21.) See 63 in this connection.

A plea of guilty does not exclude the taking of evidence, and in the event that there be aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to such circumstances should be introduced.

Whenever it appears to the court that a plea of guilty may have been entered improvidently or through lack of understanding of its meaning and effect, or whenever an accused, after a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the president or the law member, if so directed by the president, will make such explanation and statement to the accused as the occasion requires. If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if after such explanation and statement the accused

does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty. (A. W. 21.) Occasion for making such explanation and statement frequently arises in the ordinary desertion case, where the accused, after pleading guilty, testifies or states in effect that throughout his unauthorized absence he had the intention of returning.

71. COURTS-MARTIAL—PROCEDURE—Motions—*a. General.*—Three motions are discussed below, but others may be made for the purpose of making a request or of raising an objection or an interlocutory question. If a motion amounts in substance to an application for a continuance, or to a challenge, plea, or other matter for which a procedure is provided, such motion will be regarded as such application, challenge, plea, or other matter. A motion to elect—that is, a motion that the prosecution be required to elect upon which of two or more charges or specifications it will proceed—will not be granted. A motion should briefly and clearly set forth the nature of and the grounds for the request, objection, or question it is intended to make or raise. A motion admits nothing either as to the jurisdiction of the court or the merits of the case.

b. Motion to sever.—A motion to sever is a motion by one of two or more joint accused to be tried separately from the other or others. It will regularly be made at the arraignment. The motion should be granted if good cause is shown; but in cases where the essence of the offense is combination between the parties—conspiracy, for instance—the court may properly be more exacting than in other cases with respect to the question whether the facts shown in support of the motion constitute a good cause. The more common grounds of this motion are that the mover desires to avail himself on his trial of the testimony of one or more of his coaccused, or of the testimony of the wife of one; or that a defense of the other accused is antagonistic to his own; or that the evidence as to them will in some manner prejudice his defense. (Winthrop.)

If the motion is granted, the court will first decide as to which accused the court will proceed to trial, and will then direct an appropriate amendment of the charges. For instance, if after severance the trial of B is directed in a case where A and B are charged with an offense, the specification should be amended so as to allege in effect either that B committed the offense or that B committed the offense jointly with A. The amendment should be formally made as a part of the proceedings, no actual alteration being made in the charge sheet itself. For an example see form of record, App. 6. Where, as a result of action on a motion to sever, trial of one or more accused is deferred, the facts will be reported at once to

the appointing authority by the trial judge advocate in order that such authority may take appropriate action with a view to the trial of such accused by another court, or other disposition of the charges as to such accused.

c. Motion to strike out.—By this motion the accused may object to the sufficiency of a specification on the ground that it does not state any crime or offense; or that, because of some other substantial defect, the accused is actually prevented from making a proper plea or defense—for example, that it does not fairly apprise the accused of the offense intended to be charged.

Ordinarily this motion should be made upon arraignment. If sustained the court will direct that the specification be stricken out and disregarded. See 64*a* (General matters as to pleas), 72 (Nolle prosequi), and 73 (Action on defective specification).

d. Motion for findings of not guilty.—At the close of the case for the prosecution and before the opening of the case for the defense the court may, on motion of the defense for findings of not guilty, consider whether the evidence before the court is legally sufficient to support a finding of guilty as to each specification designated in the motion. The court in its discretion may require that the motion specifically indicate wherein the evidence is legally insufficient. The court will determine the matter as an interlocutory question. (See 51.) If there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion as to such specification will not be granted. The court in its discretion may defer action on any such motion as to any specification and permit or require the trial judge advocate to reopen the case for the prosecution and produce any available evidence. If the motion is sustained as to any specification the court will forthwith enter a finding of not guilty of such specification and where necessary of the proper charge.

72. COURTS-MARTIAL—PROCEDURE—Nolle Prosequi.—A nolle prosequi is a declaration of record by the prosecution to the effect that by direction of the appointing authority the prosecution withdraws a certain specification, or a certain specification and charge, and will not pursue the same further at the present trial. A nolle prosequi will be entered only when directed by the appointing authority, who may give such direction either on his own initiative or on application duly made to him. In a joint case he may limit the direction to one or more of the accused.

Proper grounds for such direction include: Substantial defect in the specification; insufficiency of available evidence to prove the

specification; and the fact that it is proposed to use one of the accused as a witness.

A nolle prosequi is not in itself equivalent to an acquittal or to a grant of pardon and is not a ground of objection or of defense in a subsequent trial. It may be entered either before or after arraignment and plea.

As to withdrawal of charges, see 5 (Appointing authorities).

73. COURTS-MARTIAL—PROCEDURE—Action on Defective Specification.—If a specification, while defective, is nevertheless sufficient fairly to apprise the accused of the offense intended to be charged, the court upon the defect being brought to its attention will, according to circumstances, direct the specification to be stricken out and disregarded, or continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case, or permit the specification to be so amended as to cure such defect, and continue the case for such time as in the opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment. The court may proceed immediately with the trial upon such amendment being made, if it clearly appears from all the circumstances before the court that the accused has not in fact been misled in the preparation of his defense and that a continuance is not necessary for the protection of his substantial rights. See in this connection 64a (General matters as to pleas).

74. COURTS-MARTIAL—PROCEDURE—Action Where Evidence Indicates an Offense Not Charged.—If at any time during the trial it becomes manifest to the court that the available evidence as to any specification is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove the guilt of the accused of some other offense not alleged in any specification before the court, the court may, in its discretion, either suspend trial pending action on an application by the trial judge advocate to the appointing authority for directions in the matter or proceed with the trial. In the latter event a report of the matter may properly be made to the appointing authority after the conclusion of the trial.

Instances of occasions for applying this rule would be where in a trial for the larceny of a watch the proof shows that the article taken was a compass; and where in a trial for the wrongful sale of property (A. W. 84) the proof shows that the accused negligently lost the property.

CHAPTER XIV

COURTS-MARTIAL—PROCEDURE

(Continued)

INTRODUCTION OF EVIDENCE

75. COURTS-MARTIAL—PROCEDURE—Introduction of Evidence.—a. General duties, etc., of court.—Where proffered evidence would be excluded on objection, the court may, and as a rule should, bring the matter to the attention of any party entitled, but failing, to object; except where such failure amounts to a waiver. See 126 (Waivers). Such action is particularly called for when improper questions are asked by a member of the court, or when improper testimony is elicited by questions of a member or of the court, the reasons for this being the natural hesitancy of the parties themselves to object to a question asked by a member of the court, and the weight likely to be given to testimony elicited through questions by the court or by a member. In the interest of justice a court may always of its own motion exclude inadmissible evidence.

Rules of evidence are stated in 110-126 (Rules of evidence), and in various special connections throughout this manual; for example, in 130 (Desertion).

The court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence.

If at any time before the court announces an acquittal or imposes a sentence it appears to the court for any reason that additional evidence with respect to the accused's mental responsibility for an offense charged should be obtained in the interest of justice, the court will call for such additional evidence. The court may adjourn pending action on a request made by it to proper authority that the accused be examined by one or more medical officers and that such officer or officers be made available as witnesses. See 250 (Suspected insan-

ity) in this connection. A request, suggestion, or motion that additional evidence be called for by the court as contemplated herein may be made by any one of the personnel of the court, prosecution, or defense. The court may, in its discretion, give priority to evidence on such issue and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense. See 78a (Reasonable doubt). If the court determines that the accused was not mentally responsible, it will forthwith enter a finding of not guilty as to the proper specification. Such priority should be given where the evidence on the matters set forth in the specification is voluminous or expensive to obtain and has little or no bearing on the issue of mental responsibility for such matters.

The court, in its discretion, may direct that a document, although excluded as not admissible in evidence, be marked for identification and appended to the record for the consideration of the reviewing authority, and will so direct on request of the party offering the document.

Where a document, which must or should be returned to the source from which it was obtained (e. g., an original record), is received in evidence or marked for identification, a suitable copy or extract copy thereof, certified as such by the trial judge advocate, will be substituted for such document so as to permit of such return.

The court may in its discretion (through the president, or the law member if the president so directs) explain to the accused his right as to each specification, to remain silent, or to testify as a witness (see 120d and 121b), or to make an unsworn statement (see 76). Such explanation should be made if the court has any doubt that the accused fully understands his rights in the premises. The explanation is usually made after the prosecution has rested.

The court should protect every witness from insulting or improper questions, harsh or insulting treatment, and unnecessary inquiry into his private affairs. The court should also forbid any question which appears to be intended merely to annoy a witness or which, though otherwise proper, is needlessly offensive in form.

b. General duties, etc., of trial judge advocate.—As to preparation for trial, attendance of witnesses, sending out interrogatories for depositions, and swearing of witnesses, see 41, 97, 98, and 95, respectively.

After the pleas the trial judge advocate will, to the extent required by the court, read the parts of this manual or of authoritative military precedents (see 128) that are pertinent to the definition, proof, and defense of the offenses charged.

He may make an opening statement—that is, a brief statement of the issues to be tried and what he expects to prove—but will avoid

including or suggesting matters as to which no admissible evidence is available or intended to be offered. Ordinarily such a statement is made only immediately before the introduction of evidence for the prosecution, but in exceptional cases the court may, in its discretion, permit like statements to be made at later stages of the proceedings.

On behalf of the prosecution he conducts the direct and redirect examination of the witnesses for the prosecution and the cross and recross examination of the witnesses for the defense. He will, unless the court otherwise directs, conduct the direct and redirect examination of witnesses for the court.

c. General duties, etc., of counsel.—He may make an opening statement for the defense similar to that indicated in 75b: This statement is ordinarily made just after the prosecution has rested or immediately following the opening statement of the trial judge advocate; but in exceptional cases the court may, in its discretion, permit it or other like statements to be made at a later stage or other stages of the proceedings.

On behalf of the defense he conducts the direct and redirect examination of the witnesses for the defense and the cross and recross examination of the witnesses for the prosecution and of the witnesses for the court.

As to preparation for trial, attendance of witnesses, and submission of interrogatories for depositions, see 45, 97, and 98, respectively.

CHAPTER XV

COURTS-MARTIAL—PROCEDURE

(Continued)

STATEMENTS—ARGUMENTS—FINDINGS—DATA AS TO SERVICE, ETC.; EVIDENCE OF PREVIOUS CONVICTIONS; EVIDENCE OF FORMER DISCHARGES; EVIDENCE OF FORMER PUNISHMENT—SENTENCE—ANNOUNCING SENTENCE; MATTERS OF AND RECOMMENDATIONS TO CLEMENCY; ADJOURNMENT

76. COURTS-MARTIAL—PROCEDURE—Statements.—The accused, whether he has testified or not, may make an unsworn statement to the court in denial, explanation, or extenuation of the offenses charged, but this right does not permit the filing of the accused's own affidavit. This statement is not evidence, and the accused can not be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. Such consideration will be given the statement as the court deems warranted.

The statement may be oral or in writing, or both; and may be made by the accused, by counsel, or by both. A written statement should be signed, and is ordinarily read to the court by the accused or by counsel.

The statement should not include what is properly argument, but ordinarily the court will not check a statement on that ground if it is being made orally and personally by an accused.

If the statement made by an accused himself includes admissions or confessions, they may be considered as evidence in the case, but in a joint trial the statement by one accused is not evidence against his coaccused. If a statement made by either accused or counsel is inconsistent with a plea of guilty or indicates that such plea may have been entered improvidently or through lack of understanding of its meaning and effect, appropriate action will be taken by the court. See 70 (Pleas to the general issue).

77. COURTS-MARTIAL—PROCEDURE—Arguments.—After both sides have rested, arguments may be made to the court by the trial judge advocate, the accused, and his counsel. The trial judge advocate has the right to make the opening argument, and if any argument is made on behalf of the defense, the closing argument. Arguments throughout the trial may be oral, in writing, or both, except where the court requires an argument to be reduced to writing.

See 41*d* and 45*b*. Arguments in writing will ordinarily be read to the court by the party who submits them. The last subparagraph of 76 applies equally to arguments.

The failure of an accused to take the stand must not be commented upon; but if he testifies and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may be commented upon. Where, however, an accused is on trial for a number of offenses and taking the stand in his own defense testifies to one or more of them only, no comment can be made on his failure to testify as to the others.

Refusal of a witness to answer a proper question may be commented upon.

As to permissible comments on the fact that one witness testified after hearing another, see 121*a* (Examination of witnesses).

After the arguments and before the court closes for the findings, both sides should be asked whether they have anything further to offer.

78. COURTS-MARTIAL—PROCEDURE—Findings.—*a. General.*— *Basis of Findings.*—Only matters properly before the court as a whole may be considered. A member should not, for instance, be influenced by any knowledge of the acts, character, or service of the accused not based on the evidence or other proper matter before the court; or by any opinions not properly in evidence; or by motives of "partiality, favor, or affection." See in this connection 76 (Statements) and 77 (Arguments). Matters as to which comment in argument is prohibited can not be considered.

A member is, however, expected to utilize his common sense, and his knowledge of human nature and of the ways of the world in weighing the evidence. In the light of all the circumstances of the case he should consider the inherent probability or improbability of the evidence, and with this in mind may properly believe one witness and disbelieve several witnesses whose testimony is in conflict with that of the one. See in this connection 124 (Credibility of witnesses) and 114*a* (Confessions).

Reasonable Doubt.—In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof. By "reasonable doubt" is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to

~~conviction; not a doubt prompted by sympathy for him as~~
except conviction; not a doubt prompted by sympathy for him as those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere probability that the accused is guilty. (See Winthrop.)

The rule as to reasonable doubt extends to every element of the offense. Thus, if, in a trial for assault with intent to kill, a reasonable doubt exists as to such intent, the accused can not properly be convicted as charged, although he might be convicted of the lesser included offense of assault. Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to such element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inference from them.

Reasons for Findings; Divulging or Disclosing Findings, etc.—No finding should include any indication of the reasons for making it. For the information of the reviewing authority, but not as a part of a finding, the court may formulate for inclusion in the record a statement of the reasons which led to a finding, and a statement of the weight given to certain evidence. A proper occasion for such action would be when the court finds an accused not guilty because of a doubt as to his sanity.

See A. W. 19 as to divulging findings, and as to disclosing or discovering the vote or opinion of a member upon the findings.

Acquittal; Statute of Limitations.—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. An acquittal auto-

matically results from findings of not guilty of all charges and specifications.

If by exceptions and substitutions the accused is found guilty of an offense against which it appears that the statute of limitations (A. W. 39) has run, the court may advise the accused in open court of his right to plead the statute in bar of punishment if he so desires. If the accused does plead the statute, the matter will be determined in substantially the same manner as provided for the determination of a plea of the statute in bar of trial.

b. Findings as to the charges.—Permissible findings include guilty; not guilty; not guilty, but guilty of a violation of the ——— Article of War.

An attempt should be found as a violation of A. W. 96, unless the attempt is included in the express terms of some other article.

The finding of the charge as to any specification should be supported by, and not be inconsistent with, the finding of that specification. Thus, where two specifications of desertion are under one charge and the accused is found guilty of the first specification, but guilty of absence without leave only as to the second specification, the finding should be; Of the Charge: As to Specification 1: Guilty. As to Specification 2: Not guilty, but guilty of a violation of the 61st Article of War. A finding of guilty of one specification appropriate to its charge requires a finding of guilty of the charge; but a finding of not guilty of another such specification under that charge does not require any finding of the charge as to it. Thus, upon finding an accused guilty of one of the two specifications under a proper charge, and not guilty of the other, the finding of the charge should be simply guilty.

c. Findings as to the specifications.—*General.*—Permissible findings include guilty; not guilty; guilty with exceptions, with or without substitutions, and not guilty of the exceptions and guilty of any substitutions as stated below.

The finding should be consistent with itself. For instance, a finding of guilty without criminality should not be made.

Any different findings as to two or more joint accused should be consistent with one another. For instance, where one of two joint accused is found not guilty and the other is found guilty, the name of the former as well as the words indicating a joint offense should be eliminated from the specification by the finding as to the latter. Where, however, three or more accused are involved, it is sufficient if the finding as to each accused clearly appears from reading the record of all the findings together.

Exceptions and Substitutions.—One or more words or figures may be excepted and, where necessary, others substituted, provided the

Facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense.

Lesser Included Offense.—If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter. A familiar instance is a finding of guilty of absence without leave under a charge of desertion. Such a finding may be thus worded when the specification is in the usual form: Of the specification: Guilty except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty.

In the discussion of certain offenses in 127-152 (Punitive articles) some of the included offenses are stated.

d. Procedure.—The court sits in closed session during deliberation on the findings. Deliberation may properly include full and free discussion as to the merits of the case. The influence of superiority in rank should not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

Voting is by secret written ballot (A. W. 31) and is obligatory. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; but a court may reconsider any finding at any time before the same has been announced or the court has opened to receive evidence of previous convictions. The order in which several charges and specifications are to be voted upon will be determined by the president, subject to the control of the court, except that all the specifications under a charge shall precede that charge. See A. W. 43 as to the number of votes required and A. W. 31 as to counting and checking votes and announcing the result of the ballot. If in computing the number of votes required a fraction results such fraction will be counted as one; thus where five members are to vote a requirement that two-thirds concur is not met if less than four concur.

79. COURTS-MARTIAL—PROCEDURE—Data as to Service, etc.; Evidence of Previous Convictions; Evidence of Former Discharges; Evidence of Former Punishment.—***a. General.***—In the event of conviction of an accused the court will open for the purpose of receiving as evidence

such data as to his age, pay, and service as may be shown on the first page of the charge sheet, and of giving the trial judge advocate an opportunity to introduce evidence of the accused's previous convictions by court-martial.

This evidence, and any evidence of the accused's former discharges (79d), and any evidence of former punishment under A. W. 104 (79e), is for consideration by the court in fixing the kind and amount of punishment. See in this connection 102-104 (Punishments).

A written stipulation containing the pertinent data as to service and previous convictions may be accepted by the court.

b. Data as to service, etc.—If the defense objects to such data as being inaccurate or incomplete in a specified material particular, or as containing certain specified objectionable matter, the court may either sustain the objection without further inquiry or proceed to determine the issue. Objections not asserted may be regarded as waived.

c. Evidence of previous convictions.—Such evidence is not limited to evidence relating to offenses similar to the one of which the accused stands convicted or to the evidence referred with the charges. Such evidence must, however, relate to offenses committed during a current enlistment, appointment, or other engagement or obligation for service of the accused, and in the case of an enlisted man during the one year, and in the case of others during the three years next preceding the commission of any offense charged. In computing the one or three years, as the case may be, periods of unauthorized absences as shown by the findings in the case or by the evidence of previous convictions should be excluded.

In the case of a general prisoner, whether the sentence of dishonorable discharge was suspended or not, the rules as to an enlisted man apply, except that the evidence of previous convictions should be limited to evidence of offenses committed during his status as a general prisoner.

Unless the accused has been tried for an offense in the sense of A. W. 40, evidence as to such offense is not admissible as evidence of a previous conviction. See 68 (Former trial).

As to documentary evidence of previous convictions, see the last subparagraph of 68 (Former trial). The accused's service record or an admissible copy or extract copy thereof may also be used. The accused may, of course, object on proper grounds to the introduction of any offered evidence of previous convictions. If he does, action as indicated in 79b will be taken. Any objection not asserted may be regarded as waived. In the absence of objection an offense may be regarded as having been committed during the required periods unless the contrary appears.

d. Evidence of former discharges.—The accused may introduce evidence of the character given him on any former discharges from

the military service, subject to the right of the prosecution to introduce in rebuttal evidence of the character given the accused on other former discharges from such service.

c. *Evidence of former punishment.*—The fact that disciplinary punishment under A. W. 104 has been enforced may be shown by the accused upon his trial for a crime or offense growing out of the same act or omission for which such punishment under A. W. 104 was imposed and enforced. (A. W. 104.)

80. COURTS-MARTIAL—PROCEDURE—Sentence.—a. General.—Basis for Determining.—To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. See 102–104 (Punishments). In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline. See in this connection 78a (Basis of findings); 79a (Evidence of former punishment); and 111 (Evidence in extenuation). Comments with respect to matters proper for consideration in fixing the punishment are made in other connections. For examples, see 128a and 139a.

In deliberating upon the sentence the court will consider only such evidence of previous convictions as relate to offenses committed in the case of an enlisted man or general prisoner during the one year, and in the case of others during the three years next preceding the commission of any offense of which the accused has been found guilty by the court.

The imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute.

If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect.

Miscellaneous.—Forms of sentences are given in App. 9. See A. W. 19 as to divulging the sentence and as to disclosing or discovering the vote or opinion of a member upon the sentence.

For the information of the reviewing authority a court-martial may formulate for inclusion in the ~~final report~~ a brief statement of the reasons for the sentence.

d. Procedure.—The court sits in closed session during deliberation on the sentence. Deliberation may properly include full and free discussion. The influence of superiority in rank should not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

Voting is by secret written ballot (A. W. 31) and is obligatory on each member regardless of his vote as to the findings. It is the duty of each member to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused. See A. W. 43 as to the number of votes required, and A. W. 31 as to counting and checking votes and announcing the result of the ballot. If in computing the number of votes required a fraction results, such fraction will be counted as one; thus where six members are to vote, a requirement that three-fourths concur is not met unless five concur. Any sentence, even in a case where the punishment is mandatory, must be concurred in by the required number of members.

81. COURTS-MARTIAL—PROCEDURE—Announcing Sentence; Matters of, and Recommendations to, Clemency; Adjournment.—When a court-martial has sentenced an accused, the court will at once announce the findings and sentence in open court, unless, in the court's opinion, good reasons exist for not making the findings and sentence public at that time. In this latter event, the president may state in open court that the findings and sentence are not to be announced.

After such announcement or statement, the defense may submit in writing for attachment to the record any matters as to clemency which it desires to have considered by the members of the court or the reviewing authority. The rules of evidence are not applicable to such matters.

One or more recommendations to clemency, each signed by the members joining therein, may be submitted to the trial judge advocate for forwarding with the record. Such recommendation may include a recommendation for the suspension of all or part of the sentence, including a sentence of dishonorable discharge. It should be specific as to amount and character of clemency recommended and as to the reasons for the recommendation.

At the conclusion of the case, the court may proceed to other business or adjourn until a definite time or adjourn to meet at the call of the president.

As to duty of trial judge advocate to notify the commanding officer of the result of trial, see 41b.

CHAPTER XVI

COURTS-MARTIAL—PROCEDURE

(Continued)

SPECIAL AND SUMMARY COURTS—REVISION—REHEARINGS

82. COURTS-MARTIAL—PROCEDURE—Special and Summary Courts.—The procedure of and before special and summary courts-martial will, as far as practicable, be that prescribed for general courts-martial unless otherwise stated.

A summary court will number cases serially in the order in which they are taken up. When the accused pleads guilty a summary court will explain to him the meaning and effect of his plea. In the absence of a plea of guilty a summary court will thoroughly and impartially investigate both sides of the matter and, in any case, will see that the interests of both the Government and the accused are fully conserved.

If the accused does not testify or make any statement in his own behalf the summary court will explain to the accused his rights as to these matters.

83. COURTS-MARTIAL—PROCEDURE—Revision.—The procedure of a general or a special court-martial when reconvened for the purpose of revising its action or correcting its record will in general be as indicated by the form of record of proceedings on revision. (See App. 6.) See A. W. 40 as to matters that can not be reconsidered. Only the members of the court who participated in the findings and sentence, together with the trial judge advocate and assistant trial judge advocate, if any, will assemble and the court will meet. The defense counsel, the accused and his individual counsel, if any, may also be present if required by the court, but their presence is otherwise not necessary. The trial judge advocate will read to the court the indorsement of the reviewing authority returning the record and directing the reconvening, or, if the record of trial by a special court-martial has been returned to him orally, he may state briefly to the court the views of the reviewing authority as communicated to him. The court is then closed, considers and takes action upon the matter before it, is opened, and adjourns. As the action so taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise. Any modification made in order that the record may conform to what took place at the trial is

formally made, no actual physical change being made in the original record. See 85*b* (Contents of record) and App. 6 (Form of record of proceedings on revision).

For procedure in reconsideration of action on special pleas and similar matters see 64*a*.

What has been said in respect to the procedure on revision by general or special courts-martial will as far as applicable govern such procedure by summary courts-martial.

84. COURTS-MARTIAL—PROCEDURE—Rehearings.—The procedure in general is the same as in other trials. See in this connection 89 (Ordering rehearings), 117*b* (Former testimony), and A. W. 50½.

No member of the general or special court rehearing the case should be permitted to examine the record of the former proceedings or any document (other than charges) referred with the charges to the trial judge advocate except when received in evidence at the rehearing; but such parts thereof as relate to the errors committed at the former hearing may be examined by the law member when necessary to enable him to decide upon the admissibility of offered evidence or other questions of law involved, and may be read to the court when necessary for it to decide a question of law under the provisions of A. W. 31.

CHAPTER XVII

COURTS-MARTIAL—RECORDS

GENERAL COURT-MARTIAL—SPECIAL AND SUMMARY COURT-MARTIAL

85. COURTS-MARTIAL—RECORDS—General Court-Martial.—a. General and miscellaneous.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it. (A. W. 33.)

The record is prepared by the trial judge advocate under the direction of the court, but the court as a whole is responsible for it. It is immaterial to the sufficiency of a record whether the same was kept or written by the trial judge advocate or by a clerk or a reporter acting under his direction. The trial judge advocate will preserve or cause to be preserved any notes, stenographic or other, from which the record of trial is prepared. These notes may be destroyed after final disposition of the case under A. W. 48, 50½, or 51.

The record of the proceedings in each case should be separate, complete, and independent in itself both in form and in substance.

b. Contents; appendages; authentication; loss.—The record must show all the essential jurisdictional facts, and will set forth a complete history of the proceedings had in open court in a case, and all the material conclusions arrived at in both open and closed sessions. For details of contents and certain exceptions to the foregoing general rule, see App. 6. When a record is amended in revision proceedings, the record of proceedings in revision will show specifically, ordinarily by page and line, the part of the original record that is changed and the change made. In a case where special pleas are sustained to all charges and specifications, or trial for other reasons does not terminate in the usual way, the record will show the proceedings as far as they went.

Accompanying the record and securely bound together will be the original charge sheet and, if not used as exhibits or otherwise properly disposed of, the other papers which accompanied the charges when referred for trial, including, where the trial was a rehearing of the case, the record of the prior hearing or hearings.

Recommendations and other papers relative to clemency will be bound into the record immediately after the exhibits. Similar action

will be taken with respect to documents marked for identification and not admitted in evidence. If the findings and sentence were not announced, the trial judge advocate or assistant trial judge advocate, or member, as the case may be, will certify after the signatures to the record that he personally recorded such findings and sentence. A copy of the reporter's voucher will be attached to the record, also any copy of the record not otherwise disposed of, and a receipt for or (if not practicable to obtain a receipt) a certificate of delivery of each copy furnished under 41e.

As to authenticating record, see A. W. 33 and App. 6.

When prior to action by the reviewing authority a record of trial is lost or destroyed, a new record will, if practicable, be prepared and will become the record of trial in the case. Such new record will, however, only be prepared when the extant original notes or other sources are such as to enable the preparation of a complete and accurate record of the case. In any case of loss of a record the trial judge advocate or other proper person will fully inform the appointing authority as to the facts and as to the action, if any, taken.

c. Disposition.—The original record and accompanying papers with proper letter of transmittal and W. D., A. G. O. Form No. 96 (G. C. M. data sheet), properly filled out, will be sent by the trial judge advocate directly to the appointing authority or to his successor, or, in the case of a court appointed by the President, to The Judge Advocate General of the Army. (See A. W. 35.)

86. COURTS-MARTIAL — RECORDS — Special and Summary Courts-Martial.—Except as otherwise indicated in the form for record of trial by special court-martial (App. 7) or elsewhere, the requirements of 85 are in general applicable to records of special courts-martial. As to records of summary courts-martial, see App. 8.

At the conclusion of the trial of each case a summary court will record and sign its findings and the acquittal or sentence as indicated by the form and will transmit the record of trial and any papers received with the charges or as evidence without letter of transmittal to the appointing authority or his successor. Where the summary court is the only officer present with the command, the record will so state, and such officer thereafter holds the record as transmitted to himself as reviewing authority.

CHAPTER XVIII

COURTS-MARTIAL—ACTION

REVIEWING AUTHORITY—CONFIRMING AUTHORITY

87. COURTS-MARTIAL—ACTION—Reviewing Authority.—*a. Who is reviewing authority.*—The reviewing authority is the officer to whom the record is transmitted as provided in 85 and 86. In his absence, however, or where the command has been otherwise changed, “the officer commanding for the time being” (A. W. 46) is the reviewing authority.

The “officer commanding for the time being” is the officer who has succeeded to the command of the appointing authority by assignment or otherwise. For example, where, pending the review of a case tried by a court appointed by the commander of a separate brigade, such brigade has ceased to exist as a distinctive organization and been merged in a division, the commander of the division is the “officer commanding for the time being,” in the sense of A. W. 46.

The fact that, pending action on the proceedings, the accused in the case leaves the command of the reviewing authority, does not divest the latter of his status as reviewing authority with respect to such proceedings.

A reviewing authority can not delegate his functions as such to anyone.

b. Powers and duties.—*General.*—Approval of a sentence by the reviewing authority is one of the actions which must precede the execution thereof (A. W. 46), and such approval must be express, an approval of the findings only, for instance, not being sufficient. An approval of the findings and proceedings is unnecessary. For powers incident to the power to approve, see A. W. 47.

Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved. Where the court lacked jurisdiction as to some of the offenses tried by it, the proceedings as to the other offenses tried are not invalid for that reason. Neither the reviewing authority nor any other officer is authorized to add to the punishment imposed by a court-martial. As to automatic reduction of non-commissioned officers and privates first class consequent upon action on certain sentences, see 103*d*. Upon a rehearing no sentence in excess of or more severe than the original sentence shall be enforced, unless the sentence be based upon a finding of guilty of an offense not considered

upon the merits in the original proceedings. (A. W. 30½.) Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A. W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense.

A. W. 37 vests a sound legal discretion in the reviewing authority to the end that substantial justice may be done. The effect of a particular error within the purview of A. W. 37 should be weighed by him in the light of all the facts as shown by the record, and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for holding the proceedings invalid, or for disapproving a finding or the sentence. No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby. If through mistake or inadvertance the trial judge advocate should be present during all or part of the closed session of a court, such irregularity is not a ground for a disapproval, unless it appears that such presence of the trial judge advocate injuriously affected the substantial rights of an accused.

The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised.

For action where he differs with the court with respect to its rulings on special pleas and similar objections, see 64a.

The disapproval of a sentence puts an end to it as a basis of punishment, and confirmation of a disapproval is not required in any case. A disapproval should be express. Neither an acquittal nor a finding of "not guilty" requires approval or confirmation; and neither should be disapproved. Such disapproval can not in any event affect the finality of a legal acquittal or of a legal finding of not guilty. The reviewing authority may, however, properly advise the members of the court by letter of his nonconcurrence in an acquittal or in a finding of not guilty, and the reasons for such nonconcurrence.

Reference of General Court-Martial Record to Staff Judge Advocate or to The Judge Advocate General.—See A. W. 46 for statutory requirement.

The staff judge advocate will submit a written review of the case. The review will include his opinion, both as to the weight of evidence and any error or irregularity, and a specific recommendation of the action to be taken together with his reasons for such opinion and recommendation. The reviewing authority may direct his staff judge advocate to make supplementary reviews or reports, oral or written, and may require a more comprehensive written review. If the reviewing authority is in doubt as to his action, he may, before acting thereon, transmit the record to The Judge Advocate General with request for advice either as to the whole case or as to any particular matter involved in the case; and will so transmit it for advice on the whole case before acting on it, if he has no staff judge advocate or officer acting as such.

Revision and Correction of Record.—A record of trial, which by reason of some apparent omission, error, or other defect appears to be substantially incomplete or incorrect, or which in the opinion of the reviewing authority shows improper action by the court as to a finding or sentence, may be returned to the president of the court (or to the summary court), directing that the court reconvene for such action as may be appropriate. See A. W. 40 for matters as to which a return of a record of trial for reconsideration is prohibited.

If a previous conviction was erroneously considered by the court, and it is believed that the consideration of such conviction influenced the court in its sentence, the reviewing authority may return the record to the court to reconsider the sentence without regard to the previous conviction.

The record of trial must speak the truth. When it appears that any material matter has through clerical error or through inadvertence been omitted or erroneously stated in the record, and it is impracticable or inconvenient to reconvene the court, the record itself, or a copy, or a synopsis of the pertinent part thereof, may be sent to the officers who authenticated the record for a certificate as to the facts with reference to such apparent omissions or erroneous statements. The certificate will be attached to the record of trial immediately after the original signatures authenticating it and will become part of the record of trial. The necessary action will be taken by the reviewing authority to the end that each accused who was furnished a copy of the record is likewise furnished a copy of such certificate. Such method of correction is appropriate where, for instance, the record of a general court-martial fails to show that the members were sworn or that the required number of members concurred in a finding. It is, of course, understood that the certificate must correspond to the facts; for instance, if in such a case the members were not in fact sworn, the certificate must so state.

Miscellaneous and Advisory Instructions.—Appropriate action should be taken where the court has imposed an unwarranted though legal punishment. For example, while evidence of previous convictions may always be considered in determining the proper measure of punishment, evidence of previous convictions of offenses materially less grave than the offense or offenses for which the sentence was adjudged is not to be regarded as in itself justifying a sentence of maximum severity. In every case the punishment should be graded according to the circumstances of the offense.

Dishonorable discharge, in itself a severe punishment, should be approved only when it is clear that the accused should be separated from the service or that he should be required to undergo a period of reformatory discipline before he can again be permitted to serve in an organization composed of honorable men. When the accused is relatively young and his record, except for the offense of which he stands convicted, is good, the reviewing authority should, in the exercise of his sound discretion, suspend the execution of the dishonorable discharge, to the end that the offender may have an opportunity to redeem himself in the military service; but he should not suspend the execution of the dishonorable discharge in any case of conviction of an offense involving that degree of moral turpitude which disqualifies the accused for further military service.

The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency (e. g., long confinement pending trial or the fact that an accomplice turned State's evidence), but any factors which properly should have been, but apparently were not, considered by the court in fixing the punishment. See 80a (Basis for determining sentence).

The reviewing authority may properly weigh the evidence in determining his action.

Ordering Execution of Sentence; Mitigation; Remission; Suspensions.—Upon approval of a sentence the reviewing authority may, subject to the provisions of A. W. 50½, order the execution thereof unless confirmation (see 88) is required. The fact that a sentence involves a loss of files or rank or other punishment described in 103½ does not of itself prevent the reviewing authority from ordering execution.

The authority ordering the execution of a sentence of death designates the time and place for such execution, any designation made by the court as to such matters being disregarded.

The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case.

Thus a sentence as mitigated should not provide for confinement in excess of six months without dishonorable discharge.

To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted except by the President or by a commanding general empowered by the President under A. W. 50.

A sentence imposing dishonorable discharge only can not be mitigated. Forfeiture of pay may be mitigated to detention of pay for a like period, or less. Confinement at hard labor may be mitigated to hard labor without confinement for a like period, or less. A sentence of dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a definite period may be mitigated to a lesser punishment, for example, to confinement at hard labor and a forfeiture of a specified portion, for example, two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence, or to hard labor without confinement for a definite period not exceeding the period prescribed in the sentence, and forfeiture of any portion not exceeding two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence.

The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced.

The authority competent to order the execution of a sentence of dismissal of an officer, or a sentence of death, may suspend such sentence until the pleasure of the President be known. (A. W. 51.)

The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension. (A. W. 52.) The reviewing authority should suspend the whole of a sentence when it appears to him that such action will promote the discipline of his command.

As to penitentiary confinement, see 90a.

Forms of Action and Related Matters.—The reviewing authority will state at the end of the record of trial in each case his decisions and orders. This equally applies in summary court cases, even where the reviewing authority is the officer that tried the case as summary court. Forms of action are in App. 10. Any reprimand or admonition provided for by the sentence of a general or special court-martial as ordered executed will be included in the action. He will sign in his own hand the action taken by him on the proceedings, his rank, and the fact that he is the commanding officer appearing after his signature. So also any supplementary or corrective action pursuant

to a holding of the board of review and The Judge Advocate General under A. W. 50½ must be signed by the reviewing authority personally.

Any action taken may be recalled and modified before it has been published or the party to be affected has been duly notified of the same.

In a proper case the action may include an order as to the release of the accused from arrest or confinement. In such a case steps should be taken with a view to the prompt carrying out of the order.

Where in his final action on a case the reviewing authority disapproves a finding of desertion or a sentence based wholly or in part on such a finding, he should indicate in his action the reasons therefor. Such reasons assist the Finance Department in making certain decisions relative to forfeitures and stoppages. In any case the reasons for a disapproval may be stated.

If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. See 90.

c. Disposition of record and related matters.—General Court-Martial.—The record, with the decisions and orders of the reviewing authority thereon, will be transmitted, ordinarily without letter of transmittal, direct to The Judge Advocate General of the Army. With the record will be forwarded the accompanying papers (see 85), six authenticated copies of the order, if there be any, promulgating the result of the trial, and two signed copies of the review of the staff judge advocate. In cases involving more than one accused an additional copy of the order of promulgation, if any, will be forwarded for each additional accused. This applies equally to cases in which the sentence is suspended under A. W. 51, but where action by a confirming authority other than the President is necessary, the record, etc., will be transmitted to such authority. Where the order of execution is withheld under A. W. 50½, the reviewing authority will, before forwarding the record, take therefrom the data necessary for drafting a general court-martial order, and when such order is issued the same number of copies thereof will be forwarded as in the case of an order not so withheld.

Special Court-Martial.—The record and accompanying papers, together with a copy of the order publishing the result of the trial, will be forwarded by indorsement to the officer exercising immediate general court-martial jurisdiction over the command. See in this connection AR 345-125 (Service record) and 345-300 (Reports of changes, etc.).

Summary Court-Martial.—The several records of trial by summary courts-martial within a command shall be filed together in the office

of the commanding officer and shall constitute the summary court record of the command. See in this connection AR 345-125 (Service record) and 345-800 (Reports of changes, etc.). A report of each trial—that is, a copy of the record—will be sent to the officer exercising immediate general court-martial jurisdiction over the command.

d. Orders and related matters.—An order promulgating the result of a trial by general or special court-martial, while not necessary to the validity of the trial, will be issued whether such result was an acquittal or otherwise. For forms of orders and data to be shown therein see App. 11 and AR 310-50. Matter unfit for publication will be set forth only in the original order, in such copies as may be furnished The Adjutant General, the authorities of the post or other place where the accused is, and to the commanding officer or other head of the place where the accused is to be confined, if confinement is involved.

The order will be of the date that the reviewing or confirming authority takes final action on the case. The order will state the date upon which the sentence was adjudged by the court.

When a rehearing is directed, neither the action of the court at the former proceeding nor the action of the reviewing or confirming authority thereon will be published in orders, but the court-martial order promulgating the final action in the case will in a separate paragraph publish such charges and specifications at the former hearing as may not have been referred for rehearing, together with the action of the court and reviewing authority thereon.

88. COURTS-MARTIAL—ACTION—Confirming Authority.—See A. W. 48 for cases where confirmation is required. The power of confirmation of certain sentences in time of war conferred by that article upon the commanding general “of the territorial department or division” can not be exercised by the commanding general of a corps area or Army area.

When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit, and then order executed as commuted, mitigated, or remitted, any sentence which under the Articles of War requires the confirmation of the President before the same may be executed. (A. W. 50.)

As to powers included in the power to confirm, see A. W. 49.

A confirming authority will be guided by the principles and provisions of 87 as far as applicable.

CHAPTER XIX

COURTS-MARTIAL—ACTION

(Continued)

ORDERING REHEARINGS—PLACE OF CONFINEMENT

89. COURTS-MARTIAL—ACTION—Ordering Rehearings.—When the President or any reviewing or confirming authority disapproves or vacates a sentence, the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court. (See A. W. 50½.)

A rehearing is not authorized where a part of the sentence has been approved.

Where the accused is convicted at the first trial of a lesser included offense only, a rehearing on the offense originally charged can not properly be ordered; although even if convicted of the offense originally charged on such improperly ordered rehearing such conviction may be valid as far as concerns a conviction of such lesser included offense.

The order directing a rehearing should be made at the time of disapproving or vacating the sentence and will ordinarily be included in the action on such sentence.

When a rehearing is directed there will be referred with the charges to the trial judge advocate the record of the former proceedings and the accompanying papers which are pertinent, together with a copy of the holding of the board of review or the review by the staff judge advocate or such other holding or opinion as may inform him of the errors made at the former hearing which necessitated a rehearing.

90. COURTS-MARTIAL—ACTION—Place of Confinement.—a. Penitentiary.—A penitentiary may be designated as the place of confinement for the whole period of confinement imposed by the sentence as ordered executed, provided such period exceeds one year, and provided also that such sentence is wholly or partly based on one or more of the offenses listed below or was imposed by way of commutation of a death sentence:

Desertion in time of war.

Repeated desertion in time of peace.

Mutiny.

An offense involving an act or omission recognized as an offense of a civil nature and made punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, whether statutory or common. Sodomy, being recognized as an offense by the common law in force in the District of Columbia, is included.

A penitentiary will not be designated as the place of confinement, except as authorized above in this paragraph (90a). For limitation on length of penitentiary confinement, see proviso of A. W. 45. Instructions as to the particular penitentiary to be designated will be issued from time to time by the War Department.

It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in addition to purely military offenses. In furtherance of this policy, reviewing authorities should designate a penitentiary as the place of confinement in every case when such action is authorized, unless it appears that the holding of the prisoner in association with misdemeanants and military offenders will not be to the detriment of such misdemeanants and military offenders, and that the purposes of punishment do not demand penitentiary confinement.

b. Disciplinary barracks; military post, etc.—Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated.

CHAPTER XX

COURTS-MARTIAL—ACTION

(Continued)

ACTION AFTER PROMULGATION

91. COURTS-MARTIAL—ACTION—Review of Sentences of Special and Summary Courts; Filing of Records and Reports.—The officer immediately exercising general court-martial jurisdiction over a command has supervisory powers over special and summary courts-martial therein. He will cause the records or reports of trial of such courts when forwarded to him as required by 87c to be examined for errors, defects, or omissions. He may take any authorized corrective or modifying action by him deemed necessary or desirable with respect to the sentence, or he may bring the matter to the attention of the authority that approved the sentence or his successor.

The office of the staff judge advocate is designated as the place for filing records of special courts-martial and reports of trials by summary courts-martial forwarded as required by 87c. Special and summary court records shall be retained in the office of the staff judge advocate until notification is received that their destruction has been authorized under the provisions of the act of August 5, 1939 (53 Stat. 1219) or that The Judge Advocate General of the Army has authorized their storage elsewhere.

92. COURTS-MARTIAL—ACTION—Correction of General Court-Martial Records.—Where a record of trial by general court-martial has been forwarded by the reviewing or confirming authority to higher authority and an error such as is referred to in 87b (Revision and correction of record, last subparagraph) is noted by such higher authority, he may himself take the action which under that subparagraph the reviewing or confirming authority might have taken.

93. COURTS-MARTIAL—ACTION—Telegraphic Report of Officer's Case.—Immediately upon the promulgation of any sentence of court-martial in the case of an officer involving suspension from rank and command, confinement, restriction, reduction in lineal rank, or any other material change in the officer's status, the commander issuing the order will advise The Adjutant General, by telegraph or similar means, of the sentence imposed as approved or mitigated and the date of promulgation thereof.

94. COURTS-MARTIAL—ACTION—Miscellaneous Matters.—As to mitigation, remission, suspension, and vacating suspension, see Articles of War 50, 52, and 53. Orders remitting the whole or any part of a sentence, issued subsequent to the order promulgating the case, will be published in appropriate general or special court-martial orders.

A sentence to dishonorable discharge may be suspended under A. W. 52 for a period beyond the term of confinement but within the current enlistment, and if the period of suspension is not specifically indicated it will be deemed to end with the current enlistment.

Also the proper authority may vacate at any time during a soldier's term of enlistment an order suspending a sentence.

Any action taken toward the suspension of the sentence of a general or special court-martial while the sentence is being served and any action taken toward vacating such suspension will be promulgated in a general or special court-martial order.

Sundry regulations relating to the execution and remission of sentences of forfeiture and confinement are contained in AR 35-2460 (Court-martial forfeiture—enlisted men) and AR 600-375 (Prisoner—general provisions).

The authority which has designated the place of confinement, or higher authority, may change the place of confinement of any prisoner under the jurisdiction of such authority; but when a military prison or post has been designated as the place of confinement of a prisoner, the place of confinement can not thereafter be changed to a penitentiary under the same sentence.

The distribution of general and special court-martial orders is announced from time to time by the War Department.

When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. (A. W. 44.) The terms "cowardice" and "fraud" as employed in A. W. 44 refer mainly to the offenses made punishable by A. W. 75 and 94. With these, however, may be regarded as included all offenses in which fraud or cowardice is necessarily involved, though the same be not expressed in terms in the charge or specification. The publication throughout the United States in press dispatches of "the crime, punishment, name, and place of abode" of the accused is a sufficient compliance with the article.

CHAPTER XXI.

OATHS

OATHS IN TRIALS BY COURTS-MARTIAL—AUTHORITY TO ADMINISTER OATHS

95. OATHS—Oaths in Trials by Courts-Martial.—In this paragraph the word “oath” includes affirmation. Forms of oaths (except of the oath to test competency and of the oath to charges) and other matters relating to oaths in trials by courts-martial are in A. W. 19 and A. W. 114. The form of oath to test competency and the form of oath to charges are shown in the second subparagraph of this paragraph (95) and App. 3, respectively. In case of affirmation the phrase “So help you God” will be omitted.

The prescribed oaths must be administered in and for each case and to each member, trial judge advocate, assistant trial judge advocate, reporter, and interpreter before he functions in the case as such. The point in the proceedings at which each of the various oaths is usually administered is shown in App. 6. In addition to the prescribed oath there may be such additional ceremony or acts as will make the oath binding on the conscience of the person taking it. While the members and the trial judge advocate and his assistants are being sworn, all persons concerned with the trial and any spectators present will stand. When the reporter, interpreter, or a witness is being sworn, he and the person administering the oath will stand. If either the trial judge advocate or an assistant trial judge advocate is to testify, the oath will be administered by the other or by the president. The trial judge advocate will administer to a challenged member who is to be examined under oath as to his competency the following oath:

You swear (or affirm) that you will true answer make to questions touching your competency as a member of the court in this case. So help you God.

96. OATHS—Authority to Administer Oaths.—Any officer or clerk of any of the departments lawfully detailed to investigate frauds on or attempts to defraud the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Coast Guard detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Coast Guard board appointed for

such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. (R. S. 188, as amended by the acts of February 13, 1911, 36 Stat. 898, and January 28, 1915, 38 Stat. 800.)

Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Department, any staff judge advocate or acting staff judge advocate, the President of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant, or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall also have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law. (A. W. 114.)

A warrant officer serving as assistant adjutant of any command has power to administer oaths for all purposes of military administration. (Sec. 4, act of Aug. 21, 1941, 55 Stat. 653.)

Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. (A. W. 26.)

In all cases in which under the laws of the United States oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, district, or Territory of the United States, by clerks and prothonotaries of courts of record of any such State, district, or Territory, by the deputies of such clerks and prothonotaries and by all magistrates authorized by the laws of or pertaining to any such State, district, or Territory to administer oaths. (Act of July 3, 1926, 44 Stat. 830.)

CHAPTER XXII .

COURTS-MARTIAL—INCIDENTAL MATTERS

ATTENDANCE OF WITNESSES—PREPARATION OF INTERROGATORIES AND TAKING OF DEPOSITIONS—EMPLOYMENT OF EXPERTS— EXPENSES OF COURTS-MARTIAL—CONTEMPTS

97. COURTS-MARTIAL—INCIDENTAL MATTERS—Attendance of Witnesses.—*a. Preliminary, general, and miscellaneous.*—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue, but such process shall run to any part of the United States, its Territories, and possessions. (A. W. 22.) Such process can not be issued for the purpose of compelling a witness to appear for preliminary examination.

In this paragraph (97) the term "trial judge advocate" includes a summary court-martial unless the context otherwise indicates.

The trial judge advocate will take timely and appropriate action with a view to the attendance at the trial of the witnesses who are to testify in person. He will not of his own motion take such action with respect to a witness for the prosecution unless satisfied that his testimony is material and necessary and that a deposition will, for any reason, not properly answer the purpose, or will involve equal or greater inconvenience or expense. Such action will be taken with respect to all witnesses requested by the defense, except that where there is reason to believe that the testimony of a witness so requested would be immaterial or unnecessary, or that a deposition would fully answer the purpose and involve less expense or inconvenience, the matter may be referred for decision to the appointing authority or to the court, according to whether the question arises before or after the trial commences. The trial judge advocate may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest such facts or they are unimportant. An application for the attendance of a witness may sometimes be withdrawn if the trial judge advocate offers to enter into a stipulation as to the testimony of such witness. In connection with the subject of this subparagraph, see 97*b* (Warrant of attachment).

b. Civilian witnesses.—Issue, Service, and Return of Subpoena.—A subpoena is prepared, signed, and issued in duplicate, as indicated herein, and on the form (W. D., A. G. O. Form No. 117).

If practicable, a subpoena will be issued at such time as will permit service to be made or accepted, at least 24 hours before the time the witness will have to start from home in order to comply with the subpoena. Where a subpoena requires the witness to bring with him a document or documents to be used in evidence, each document will be described in sufficient detail to enable the witness to identify it readily.

Unless he believes that formal service is advisable, the trial judge advocate will mail the subpoena in duplicate and a return addressed penalty envelope to the witness with a request that he sign the acceptance of service on one copy and return such copy in the penalty envelope. Such envelope should be addressed to the trial judge advocate of the court and not to the officer by name. The trial judge advocate may, and ordinarily should, include with such request a statement to the effect that the rights of the witness to fees and mileage will not be prejudiced by a compliance with the request.

Where formal service is or is believed to be necessary, the trial judge advocate will take appropriate action with a view to timely and economical service. For example, if the witness is near the station of the trial judge advocate he or some one detailed or designated by the commanding officer of such station may serve the subpoena; or if the witness is near some other military station the duplicate subpoenas may be inclosed in a suitable letter to the commanding officer of that station; or the duplicate subpoenas may be inclosed in a suitable letter to the commander of the corps area or similar command within which the witness resides or may be found. Any such commander or commanding officer will take appropriate action with a view to the prompt service of the subpoena by the most economical available means. Travel orders will be applied for when necessary. Service will ordinarily be made by a person subject to military law, but may legally be made by others. Service is made by personal delivery of one of the copies to the witness. The other copy, with proof of service made as indicated on the form (W. D., A. G. O. Form No. 117), will be promptly returned to the trial judge advocate. If service can not be made, the trial judge advocate will be promptly so informed. When use for it is probable, a return addressed penalty envelope, addressed to the trial judge advocate and not to the officer by name, may be sent to the person who is to serve the subpoena.

Neglect or Refusal to Appear.—See A. W. 23 down to, but excluding, the second proviso, and second subparagraph below (Warrant of attachment).

In order to maintain a prosecution under the part of A. W. 23 referred to, a person must not only be duly subpoenaed but be paid or tendered fees, including fee for one day's actual attendance, and mileage both ways "at the rates allowed to witnesses attending the courts of the United States." (A. W. 23.) Whenever such action appears to be advisable, appropriate steps will be taken by the trial judge advocate with a view to such payment or tender at the time of the service of the subpoena. See AR 35-4120. If an officer, charged with serving a subpoena, pays the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement.

Warrant of Attachment.—In any case the trial judge advocate may properly consult the court as to the desirability of issuing an attachment under A. W. 22. He should consult the court before issuing a warrant of attachment for a witness desired by the defense, if, in his opinion, the evidence desired can be obtained in another manner, or if he is willing to admit that the witness would testify as stated by the defense.

Whenever it becomes necessary to issue a warrant of attachment (W. D., A. G. O. Form No. 119), the trial judge advocate will issue, direct, and deliver or send it for execution to an officer designated for the purpose by the commander of the proper corps area or other command.

As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for such action may be inquired into by a writ of habeas corpus. For this reason the warrant of attachment should be accompanied by the following papers to enable the officer to make a full return in case a writ of habeas corpus is served upon him: A copy of the charges in the case, including the order referring the charges for trial and copies of the orders appointing the court-martial, each sworn to be a full and true copy of the original by the trial judge advocate; the original subpoena, showing proof of service of same; and an affidavit of the trial judge advocate that the person being attached is a material witness in the case, that such person has failed and neglected to appear although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for such failure to appear.

In executing such process it is lawful to use only such force as may be necessary to bring the witness before the court. Whenever the use of force is likely to be actually required and whenever travel or other orders are necessary, appropriate application to the proper commander will be made by the officer who is to execute the process.

For matters relating to habeas corpus proceedings in connection with attachments, see 153-157.

c. Military witnesses.—The attendance of persons in the military service stationed at the place of meeting of the court, or so near that no expense of transportation will be involved, will ordinarily be obtained by informal notice served by the trial judge advocate on the person concerned that his attendance as a witness is desired. If for any reason formal notice is required, the trial judge advocate will request the proper commanding officer to order the witness to attend; but if mileage is involved, the proper superior will be requested to issue the necessary order. The attendance of persons on the retired list, not assigned to active duty, should be obtained in the same manner as in cases of civilian witnesses not in Government employ. No travel order will be issued in such cases. If practicable, request for the attendance of military witnesses will be so made that the witness will have at least 24 hours' notice before starting to attend the meeting of the court.

98. COURTS-MARTIAL—INCIDENTAL MATTERS—Preparation of Interrogatories and Taking of Depositions.—*a. Preliminary, general, and miscellaneous.*—For statutory provisions, see A. W. 25 and 26. For use of deposition in evidence, see 119*a*.

Where the name of the person whose deposition is desired is unknown, he may be identified in the interrogatories and any accompanying papers by his office or position; e. g., "Commanding Officer, Company C, 27th Infantry"; "Cashier, Commercial National Bank, Fort Leavenworth, Kansas."

In this paragraph (98), unless the context otherwise indicates, the term "trial judge advocate" includes a summary court-martial.

b. Preparation of interrogatories.—The party desiring a deposition ordinarily submits to the opposite party the interrogatories he wishes the witness to answer; but he may submit them to the court, and the court, when it desires the deposition of a witness, may direct the trial judge advocate to submit appropriate interrogatories to the court. In any case all parties in interest will be given full opportunity to submit cross-interrogatories and additional interrogatories, direct and cross, as desired. Where the defense in a capital case submits interrogatories, cross-interrogatories may be submitted to the same extent as in a case not capital.

If the interrogatories and cross-interrogatories are submitted to the court, objections on any ground known at the time will ordinarily be made and passed upon at that time. A wider latitude than usual should be allowed as to leading questions.

c. Sending out interrogatories.—All interrogatories are entered upon the form (W. D., A. G. O. Form No. 118) as indicated by the notes and instructions thereon. According to circumstances, and having regard to economy, promptness, and the proper taking of the deposi-

tion, the trial judge advocate may send the interrogatories to the commanding officer of the military station nearest the witness; to a responsible person, preferably one competent to administer oaths; to a corps area, department, or other superior commander; to the witness himself; or to The Adjutant General. According to circumstances the interrogatories will be accompanied by such of the following as are advisable or necessary; a proper explanatory letter, an addressed return penalty envelope, subpoenas in duplicate, voucher for fees and mileage.

The return penalty envelope should be addressed to the trial judge advocate of the court and not to the officer by name. The subpoenas will, and the voucher will not, be signed; but both subpoenas and voucher will be completed to the extent permitted by the known facts, and the latter will be accompanied by the required number of copies of the orders appointing the court.

d. Action by officer receiving interrogatories.—When interrogatories are received by a military officer, he will take appropriate action with a view to the prompt and economical taking of the deposition by a competent person; the sending of the deposition to the trial judge advocate (addressed by office, not by name); and the payment of the necessary fees. Subject to limitations on his authority, he may, for example, send a suitable person to the residence of the witness; or arrange by mail or otherwise for the taking of the deposition; or, in the case of a civilian witness, subpoena him or arrange for his attendance without subpoena.

e. Suggestions for person taking deposition.—Before a witness gives his answers to the interrogatories they should be read and, if necessary, explained to him, or he should be permitted to read them over in order that his answers may be clear, full, and to the point. The person taking the deposition should not advise the witness how he should answer, but he should endeavor to see that the witness understands the questions and what is desired to be brought out by them, and that his answers are clear, full, and to the point.

If a military officer takes a deposition, he will ordinarily complete and certify the voucher. When a deposition is taken by a civil officer, he should, if so requested, obtain and furnish with return of the deposition the data necessary for the completion of the witness voucher.

f. Action on receipt of deposition.—Upon receipt of the deposition the trial judge advocate will advise the accused or his counsel of that fact and will give them an opportunity to examine the deposition before the trial.

g. Depositions on oral interrogatories.—Depositions may be taken on oral interrogatories by consent of the parties or by direction of the court. The procedure in taking such depositions will conform gen-

erally to that outlined above. However, instead of writing out the questions to be asked the witness, each party will indicate in a separate letter or memorandum the nature of the charges and the points desired to be covered in the examination of the witness. Whenever practicable the commanding officer to whom the papers are sent as contemplated by *c* above will, in addition to designating the person authorized by law to administer oaths to take the deposition, detail an officer to represent each side in propounding the questions.

99. COURTS-MARTIAL—INCIDENTAL MATTERS—Employment of Experts.—When the employment of an expert is necessary during a trial by court-martial, the trial judge advocate, in advance of the employment, will, on the order or permission of the court, request the appointing authority to authorize such employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense. Where in advance of trial the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the appointing authority for authority to employ the expert, stating the necessity therefor and probable cost thereof.

100. COURTS-MARTIAL—INCIDENTAL MATTERS—Expenses of Courts-Martial, etc.—See AR 35-4120.

101. COURTS-MARTIAL — INCIDENTAL MATTERS — Contempts.—See A. W. 32.

The conduct described in A. W. 32 constitutes a direct contempt. Indirect or constructive contempts (i. e., those not committed in the presence or immediate proximity of the court while it is in session), and the conduct and acts described or referred to in A. W. 23 are not included, but may be punishable under other provisions of law, such as, for instance, A. W. 23, in the case of persons not subject to military law, and A. W. 96 in the case of persons so subject.

The words "any person", as used in A. W. 32, include all persons, whether subject to military law or not. They do not include members of the court itself, although such members may be punishable as indicated in 38a.

Where a contempt punishable under A. W. 32 has been committed, the court may, after giving the party an opportunity to be heard, impose a punishment within the limits prescribed by A. W. 32. A record is made in and as a part of the regular record of the case before the court showing the facts as to the contempt and the proceedings with reference to it. Sentences adjudged for contempt require the approval of the reviewing authority in order to be effective.

The court, instead of proceeding as stated above, may, for example, cause the removal of the offender and in a proper case initiate a prosecution against him before a civil or military court.

CHAPTER XXIII

COURTS-MARTIAL—PUNISHMENTS

GENERAL LIMITATIONS—MISCELLANEOUS LIMITATIONS AND COMMENTS—MAXIMUM LIMITS OF PUNISHMENTS

102. COURTS-MARTIAL—PUNISHMENTS—General Limitations.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited. (A. W. 41.)

Courts-martial will not impose any punishment not sanctioned by the custom of the service, such as carrying a loaded knap-sack, wearing of irons, shaving the head, placarding, pillory, stocks, and tying up by the thumbs. Military duties, such as guard duty, drills, the sounding of calls, will not be degraded by imposing them as punishments. Solitary confinement, a bread-and-water diet, loss of good-conduct time, and the placing of a prisoner in irons will not be imposed as punishments by a court-martial.

For other limitations, see 101 (Contempts), 103 (Miscellaneous limitations), and 104 (Maximum limits).

103. COURTS-MARTIAL — PUNISHMENTS — Miscellaneous Limitations and Comments.—*a. General courts-martial.*—The death penalty is mandatory in the case of spies (A. W. 82); dismissal is mandatory for conduct unbecoming an officer and gentleman (A. W. 95); either death or imprisonment for life is mandatory for murder and rape (A. W. 92); punishment is mandatory in part and discretionary in part for false muster (A. W. 56), false returns (A. W. 57), officer drunk on duty in time of war (A. W. 85), and personal interest in the sale of provisions (A. W. 87). Punishment as adjudged by the court for any such offense must be in conformity with the pertinent article. For instance, the sentence of the court upon conviction of a violation of A. W. 95 must be dismissal; nothing less in any event, and, if convicted of that alone, nothing more. However, upon conviction of an offense under A. W. 92, dishonorable discharge may legally be imposed with life imprisonment.

The death penalty can not be imposed, except for an offense expressly made so punishable in the Articles of War. (A. W. 43.) See 14 for a statement of the particular articles. Although an offense may thus expressly be made punishable by death, the death penalty can not be imposed for that offense if the applicable limit of punishment prescribed by the President under A. W. 45 (see 104) is less than death.

A court-martial in imposing the sentence of death will prescribe the method, whether by hanging or shooting. Hanging is considered more ignominious than shooting and is the usual method, for example, in the case of a person sentenced to death for spying, for murder in connection with mutiny, or for a violation of A. W. 92. Shooting is the usual method in the case of a person sentenced to death for a purely military offense, as sleeping on post.

b. Special and summary courts-martial.—Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months. (A. W. 13.) Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay. (A. W. 14.) Neither a special nor a summary court-martial can impose dismissal or dishonorable discharge (A. W. 108, A. W. 118), but these courts are not limited to the kinds of punishments stated in A. W. 13 and A. W. 14. See 17 as to apportionment that may be required if a summary court-martial wishes to impose both confinement and restriction.

c. Officers, warrant officers, members of the Army Nurse Corps, aviation cadets.—In general, any limitation as to the punishments that may be imposed on an officer by court-martial is applicable to the case of a warrant officer, nurse, or aviation cadet. An officer can not be reduced in grade (*e. g.*, from captain to first lieutenant) or to the ranks, or to the grade or status of a warrant or noncommissioned officer, or sentenced to confinement at hard labor unless the sentence includes dismissal, or to hard labor without confinement in any case. Similar limitations apply in the case of a warrant officer, nurse, or aviation cadet.

d. Enlisted men; general prisoners.—For the maximum limits of punishment for certain offenses by enlisted men, see 104. A sentence in the case of a noncommissioned officer or private first class, which as ordered executed or as suspended includes either dishonorable discharge, whether suspended until release from confinement or not, or hard labor, whether with or without confinement, immediately reduces such noncommissioned officer or private first class to the grade of private. Authorized punishments for enlisted men, subject to any limitations applicable in a particular case, include reduction to the seventh grade from the sixth or any higher grade. Loss of specialist rating, loss of all rights and privileges arising from a certificate of eligibility to promotion, and reduction of a noncommissioned officer to a lower noncommissioned grade are unauthorized by sentence of court-martial.

The fact that a general prisoner is at the time of sentence in the status of a general prisoner under suspended sentence of dishonorable discharge does not prevent the imposition of dishonorable discharge and other forms of punishment, but if the general prisoner is not in such status the imposition of any form of punishment other than confinement at hard labor would in general be futile.

e. Reprimand; admonition.—There is no restriction either as to the court which may impose these punishments or as to the persons subject to military law on whom they may be imposed, but the court will not fix the terms or wording of the reprimand or admonition.

f. Restriction to limits.—This form of punishment is rather a deprivation of privileges than confinement. There is no restriction either as to the court which may impose this punishment or as to the persons subject to military law on whom it may be imposed, but it will not be imposed in excess of three months and will not in any event operate to exempt the person on whom it is imposed from any military duty.

g. Forfeiture; fines; detention of pay.—To be effective any forfeiture, fine, or detention intended must be imposed in express terms. Forfeiture of pay, without mention of allowances, does not affect allowances, and vice versa. Fines and forfeitures accrue to the United States and can not be imposed by sentence of court-martial for the benefit of any individual. A court-martial has no authority to provide by stoppage, assignment, or otherwise, for the settlement of any pecuniary liability whatever, including any liability to the Government and any liability to a government agency, such as a company fund. Forfeitures of deposits or of the interest thereon can not be imposed by sentence of a court-martial. A sentence requiring a deposit or contribution of pay or other funds is illegal. See, generally, as to forfeitures, Army Regulations relating to the Finance Department, particularly AR 35-2460 (Court-martial forfeitures—enlisted men).

Fine is expressly recognized as a form of punishment in A. W. 80 and A. W. 94.

Detention of pay will not be imposed by sentence of a court-martial except on enlisted men of the Army.

h. Loss of rank; loss of promotion; suspension from rank, command, or duty.—Loss of rank is accomplished by a sentence directing that the accused be reduced in rank a certain number of files, or that he be reduced in rank to the foot of the list of officers of his grade, or that he be reduced in rank so that he shall be and remain at the foot of the list of his grade for a certain length of time.

Loss of promotion is, if the name of the accused is on the promotion list, accomplished by a sentence directing that the accused be reduced on the promotion list a certain number of files. If the

accused is entitled to promotion after a certain period of service, the sentence should direct that he be suspended from promotion for a certain length of time after his promotion would otherwise be due.

Suspension from rank includes suspension from command. It does not affect an officer's right to promotion nor his right to rise in files, but renders him ineligible to sit as a member of a court-martial, court of inquiry, or military board, and deprives him of privileges depending on rank, such as any priority dependent on rank in the selection of quarters.

Suspension from command merely deprives the officer of authority to exercise military command, and consequently of his authority to give orders to his juniors and to perform any duty involving the exercise of command. It does not affect an officer's right to promotion.

Suspension from duty is analogous to suspension from command and is particularly appropriate in the case of an officer assigned to a purely administrative duty not involving the exercise of military command.

i. Confinement at hard labor; hard labor.—Confinement "without hard labor" will not be imposed. See A. W. 37 as to effect of a failure to couple hard labor with confinement. The place of confinement will not be designated by the court.

Hard labor without confinement will not be imposed in excess of three months.

Hard labor without confinement, imposed as a punishment by court-martial, shall be performed in addition to other duties which fall to the soldier; and no soldier shall be excused or relieved from any military duty for the purpose of performing such hard labor. A sentence imposing hard labor shall be considered as satisfied when the soldier shall have performed hard labor during available time in addition to performing his military duties.

104. COURTS-MARTIAL—PUNISHMENTS—Maximum Limits of Punishments.—*a. Persons and offenses.*—The limits prescribed herein (104) will be applied by courts-martial in cases of enlisted men only, excluding aviation cadets and including general prisoners not dishonorably discharged provided that the punishment in any case for an offense committed before the date this manual became effective will not exceed either any applicable limit prescribed in this manual or any applicable limit operative on the day before this manual became effective.

b. General limitations.—The limitations herein (104) do not exclude any other applicable limitations; for example, those set forth in 102 and 103.

A court shall not, by a single sentence which does not include dishonorable discharge, adjudge against an accused:

Forfeiture of pay at a rate greater than two-thirds of his pay per month.

Forfeiture of pay in an amount greater than two-thirds of his pay for six months.

Confinement at hard labor for a period greater than six months.

A court shall not, by a single sentence, adjudge against an accused:

Detention of pay at a rate greater than two-thirds of his pay per month.

Detention of pay in an amount greater than two-thirds of his pay for three months.

In the execution of a single sentence not including dishonorable discharge, and in the execution of two or more concurrent sentences against the same accused, none of which includes dishonorable discharge, any forfeiture or forfeitures of pay, included in the sentence or sentences shall be applied, together with other authorized stoppages or deductions, if any, excepting such as are made at the request of the accused, so as not to deprive the accused of more than two-thirds of his pay for any month.

c. Maximum punishments.—The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service.

The description of each offense listed must be construed in connection with the Article of War under which such offense is listed.

Subject to all applicable limitations, substitution for the punishments specified are authorized, at the discretion of the court, at the following rates, unless dishonorable discharge is imposed:

Forfeiture	Confinement at hard labor	Detention	Hard labor without confinement	Restriction to limits
1 day's pay	1 day	1½ day's pay	1½ days	3 days

In computing what the maximum amount of forfeiture is in dollars and cents (see forms of sentences, App. 9) the soldier's base pay (of the reduced grade if the sentence carry a reduction) plus pay for length of service will be taken as the basis. The term "base pay" comprehends no element of pay other than the minimum base pay of the grade or class within grade as fixed by statute and does not include specialists' pay or extra pay for any special qualification in the use of arms or incident to an award of a decoration of honor. In computing time of absence without leave any one continuous period

of absence found that totals not more than 24 hours is counted as a day; any such period found that totals more than 24 hours and not more than 48 hours is counted as two days, and so on. The hours of departure and return on different dates are assumed to be the same if both are not found.

In determining the maximum punishment for two or more separate and distinct, but like, offenses against property, values as found in different specifications can not be aggregated.

Table of maximum punishments

SECTION A

Article of War	Offenses	Punishments				
		Dishonor- able dis- charge, forfeiture of all pay and allow- ances due and to become due	Confinement at hard labor not to exceed—			For- feiture of two- thirds pay per month, not to exceed—
			Years	Months	Days	Months
						Days
54	Enlistment, fraudulent Procured by means of willful misrep- resentation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to a conviction of a civil or military offense, or in regard to im- prisonment under sentence of a court.	Yes	1			
	Other cases of	Yes		6		
55	Attempting to desert After not more than 6 months in service	Yes		6		
	After more than 6 months in service	Yes		9		
	In execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes	3			
	Desertion Terminated by apprehension— Not more than 6 months in service at time of desertion	Yes	1½			
	More than 6 months in service at time of desertion	Yes	2½			
	Terminated by surrender— After absence of not more than 60 days	Yes	1			
	After absence of more than 60 days	Yes	1½			
	In the execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing	Yes	5			
56	Advising another to desert			6		6
	Assisting knowingly, or persuading another to desert	Yes	1			
61	Absence without leave: From command, quarters, station, or camp— For not more than 60 days, for each day or fraction of a day of absence				3	2
	For more than 60 days	Yes		6		
	From guard— For not more than 1 hour				3	15
	For more than 1 hour			6		6
	With intent to abandon					
	Failing to repair at the fixed time to the prop- erly appointed place of— A routine scheduled duty other than March					3
	Reveille or retreat roll call			2		3

* NOTE.—The limitations upon punishments for violations of Articles of War 55, 56, and 61 were sus-
pended until further order, as to offenses thereafter committed, by Executive Order 5043, February 3, 1942
(Sec. IV, Bull. 4, W. D., Feb. 3, 1942). The limitations upon punishments for absence without leave from
command, guard, quarters, station, or camp in violation of Article of War 61 were suspended until further
order, as to offenses committed after December 1, 1942, by Executive Order 5267, November 9, 1942 (Sec. I,
Bull. 37, W. D., Nov. 10, 1942).

Table of maximum punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments				
		Disbonor- able dis- charge, forfeiture of all pay and allow- ances due and to become due	Confinement at hard labor not to exceed—			For- feiture of pay per month, not to exceed—
			Years	Months	Days	Months
61	Leaving without permission the property appointed place of assembly for, or place for— A routine duty.....					5 2
62	Reveille or retreat roll call.....					
63	Using contemptuous or disrespectful words against the President, Vice President, etc.	Yes	1			
63	Behaving with disrespect toward his superior officer.....			6		6
64	Willful disobedience except in time of war or grave public emergency of the lawful order of a commissioned officer in the exe- cution of his office.....	Yes	5			
65	Attempting to strike or attempting otherwise to assault a warrant officer or a noncom- missioned officer in the execution of his office.....			6		6
	Behaving in an insubordinate or disrespect- ful manner toward a warrant officer or a noncommissioned officer in the execution of his office.....			2		2
	Disobedience, willful, of the lawful order of a warrant officer or a noncommissioned officer in the execution of his office.....			6		6
	Striking or otherwise assaulting a warrant officer or a noncommissioned officer in the execution of his office.....	Yes	1			
	Threatening to strike or otherwise assault or using other threatening language toward a warrant officer or a noncommissioned officer in the execution of his office.....			4		4
	Using insulting language toward a warrant officer or a noncommissioned officer in the execution of his office.....			2		2
66	Drawing a weapon upon a nurse, band leader, warrant officer, field clerk, or a noncom- missioned officer quelling a quarrel, fray, or disorder.....	Yes	3			
	Refusing to obey a nurse, band leader, war- rant officer, field clerk, or a noncommis- sioned officer quelling a quarrel, fray, or disorder.....	Yes	1			
	Threatening a nurse, band leader, warrant officer, field clerk, or a noncommissioned officer quelling a quarrel, fray, or disorder.....			6		6
69	Breach of arrest.....			3		3
	Escaping from confinement.....	Yes	1			
73	Releasing, without proper authority, a pris- oner committed to his charge.....	Yes	1			
	Suffering a prisoner committed to his charge to escape.....					
	Through design.....	Yes	1			
	Through neglect.....			6		6
83	Suffering, through neglect, military property to be damaged, lost, spoiled, or wrongfully disposed of.....					
	Of a value of \$20 or less.....			3		3
	Of a value of \$20 or less and more than \$20.....			6		6
	Of a value of more than \$20.....	Yes	1			
	Suffering, willfully, military property to be damaged, lost, spoiled, or wrongfully dis- posed of.....					
	Of a value of \$20 or less.....			6		6
	Of a value of \$20 or less and more than \$20.....	Yes		6		
	Of a value of more than \$20.....	Yes	2			

Table of maximum punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay not to exceed—
			Years	Months	Days	Months
84	Injuring or losing, through neglect, horse, arms, ammunition, accoutrements, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes: Of a value of \$20 or less..... Of a value of \$20 or less and more than \$20..... Of a value of more than \$20..... Injuring or losing, willfully, horse, arms, ammunition, accoutrements, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes: Of a value of \$20 or less..... Of a value of \$20 or less and more than \$20..... Of a value of more than \$20..... Selling or otherwise wrongfully disposing of horse, arms, ammunition, accoutrements, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes: Of a value of \$20 or less..... Of a value of \$20 or less and more than \$20..... Of a value of more than \$20.....	Yes Yes Yes Yes Yes Yes Yes Yes	1 1 6	3 6 6 6 6 6	3 6 6 	

*Note.—See footnote, page 97, *supra*.

Table of maximum punishments—Continued

SECTION A—Continued

Article of War	Offenses	Dishonorable discharge for forfeiture of all pay and allowances due and to become due	Punishments				
			(confinement at hard labor not to exceed—)			For forfeiture of two thirds pay per month, not to exceed—	For forfeiture of pay not to exceed—
			Years	Months	Days	Months	Days
93	Perjury	Yes	5				
94	Forging or counterfeiting a signature making a false oath and offenses related to either of these	Yes	5				
	Other cases						
	When the amount involved is \$20 or less	Yes		6			
	When the amount involved is \$50 or less and more than \$20	Yes	1				
	When the amount involved is more than \$50	Yes					
95	Abusing a public animal					3	
	Allowing a prisoner to receive or obtain in forwarding liquor				1	3	
	Appearing in civilian clothing without authority						10
	Appearing in unclean uniform or not in prescribed uniform or in uniform worn otherwise than in manner prescribed			1		1	
	Assault			3		3	
	Assault and battery			6		6	
	Attempting to escape from confinement	Yes		6			
	Breach of restriction (other than quarantine) to command quarters station or camp			1		1	
	Carrying a concealed weapon			3		3	
	Committing a nuisance			3		3	
	Concealing destroying mutilating obliterating or removing willfully and unlawfully a public record or taking and carrying away a public record with intent to conceal destroy mutilate obliterate remove, or steal the same	Yes	3				
	Conspiring to escape from confinement	Yes		6			
	Destroying willfully public property						
	Of a value of \$20 or less	Yes		6			
	Of a value of \$50 or less and more than \$20	Yes	1				
	Of a value of more than \$50	Yes	5				
	Discharging through carelessness a firearm			1		3	
	Disorderly in command quarters station or camp			1		1	
	Disorderly under such circumstances as to bring discredit upon the military service			4		4	
	Drinking liquor with prisoner			2		2	
	Drunk and disorderly in command quarters station or camp			3		3	
	Drunk and disorderly under such circumstances as to bring discredit upon the military service			6		6	
	Drunk in command, quarters, station, or camp						15
	Drunk under such circumstances as to bring discredit upon the military service			3		3	
	Drunk prisoner found			3		3	
	Failing to obey a lawful order			6		6	
	Of a superior officer			4		3	
	Of a noncommissioned officer			6			
	Failing to pay a just debt under such circumstances as to bring discredit upon the military service	Yes					
	False official report or statement knowingly made						
	By a noncommissioned officer			3		3	
	By any other soldier			1		1	
	False swearing	Yes	3				
	Gambling						
	By a noncommissioned officer with a person of lower military rank or grade					3	
	In command quarters, station, or camp in violation of orders			2		2	

Table of maximum punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay not to exceed—
			Years	Months	Days	Months	Days
90	Indecent exposure of person.			6		6	
	Introducing a habit-forming narcotic drug into command, quarters, station, or camp.						
	For sale.	Yes.	2				
	All other cases.	Yes.	1				
	Introducing intoxicating liquor into command, quarters, station, or camp.						
	For sale.			6		6	
	All other cases.			3		3	
	Lending money, either as principal or agent, at an usurious rate of interest to another in the military service.					3	
	Obtaining money or other property under false pretenses.						
	When the amount obtained is \$20 or less.	Yes.		6			
	When the amount obtained is \$50 or less and more than \$20.	Yes.	1				
	When the amount obtained is more than \$50.	Yes.	3				
	Sentinel						
	Offenses against—						
	Attempting to strike or attempting otherwise to assault, in the execution of his duty.			6		6	
	Behaving in an insubordinate or disrespectful manner toward, in the execution of his duty.			1		1	
	Disobedience, willful, of the lawful order of, in the execution of his duty.	Yes.	1				
	Failing to obey a lawful order of.			3		3	
	Striking or otherwise assaulting, in the execution of his duty.	Yes.	1				
	Threatening to strike or otherwise assault or using other threatening language toward, in the execution of his duty.			4		4	
	Using insulting language toward, in the execution of his duty.			3		3	
	Offenses by—						
	Loitering or sitting down on duty.			1		1	
	Straggling.			3		3	
	Subornation of perjury.	Yes.	5				
	Unclean countenance, arms, clothing, equipment, or other military property, found with.			1		1	
	Violation of condition of parole by general prisoner.			3			

SECTION B

Permissible additional punishments.—If an accused be found guilty by the court of an offense or offenses for none of which dishonorable discharge is authorized, proof of five or more previous convictions will authorize dishonorable discharge, total forfeitures, and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months.

If an accused be found guilty by the court of two or more offenses for none of which dishonorable discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more, will authorize dishonorable discharge and total forfeitures.

Upon the conviction of a noncommissioned officer or a private, first class, of an offense or offenses for which confinement at hard labor for a period of more than 5 days, authorized substitutions considered, may be adjudged, the court may, in addition to the punishments otherwise authorized, adjudge reduction to the grade of private. Reprimand or admonition may be adjudged in any case.

CHAPTER XXIV

DISCIPLINARY POWER OF COMMANDING OFFICER

AUTHORITY; POLICY; EFFECT OF ERRORS—PUNISHMENTS—PROCEDURE—APPEALS—MISCELLANEOUS

105. DISCIPLINARY POWER OF COMMANDING OFFICER—Authority; Policy; Effect of Errors.—For statutory basis of authority, see A. W. 104. Subject to the provisions of A. W. 104 and of this chapter, the commanding officer of any detachment, company, or higher command may, for minor offenses, without the intervention of a court-martial, impose disciplinary punishments upon persons of his command who are subject to military law, including officers. This authority of a commanding officer can not be delegated, but communications with respect thereto may be signed or transmitted by him personally or as provided for official communications in general.

Whether or not an offense may be considered as "minor" depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking, the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense.

A. W. 104 and the provisions of this chapter do not apply to, include, or limit the use of those nonpunitive measures that a commanding officer is authorized and expected to use in order to further the efficiency of his command, such as administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, etc., written or oral, not intended or imposed as a punishment for a military offense. The fact that admonition and reprimand are termed disciplinary punishments by A. W. 104 does not deprive a commanding officer of the power he had prior to the enactment of that article to make use of admonition and reprimand, not as a penalty but as a purely corrective measure, more analogous to instruction than to punishment, in the strict line of his duty to create and maintain efficiency. A commanding officer should resort to his power under A. W. 104 in every case where punishment is deemed necessary and where that article applies, unless it is clear that punishment under that article would not meet the ends of justice and

discipline. Superior commanders should restrain any tendency of a subordinate commander to resort unnecessarily to court-martial jurisdiction for the punishment of offenders.

Any failure to comply with the regulations in this chapter will not invalidate a punishment imposed under A. W. 104, except to the extent that may be required by a clear and affirmative showing of injury to a substantial right of the person on whom the punishment was imposed, which right was neither expressly nor impliedly waived.

106. DISCIPLINARY POWER OF COMMANDING OFFICER—Punishments.—Authorized punishments include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture or detention of pay, or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of A. W. 104, also impose upon an officer of his command below the grade of a major a forfeiture of not more than one-half of such officer's monthly pay for one month.

Except as otherwise prescribed, the immediate commanding officer of the accused is charged with the execution of punishment imposed pursuant to A. W. 104. He has power to suspend the execution of such punishment and to vacate such suspension.

Hard labor will not be imposed or enforced as a punishment against any person of actual, relative, or assimilated rank above that of a private, first class, in the Army, and no form of punishment is permitted which tends to degrade the rank of the person on whom such punishment is imposed. Punishments will be strictly enforced. Any failure in this respect has, if anything, a worse effect on discipline than an unwarranted condonation of the offense for which the punishment was imposed.

107. DISCIPLINARY POWER OF COMMANDING OFFICER—Procedure.—The commanding officer, after ascertaining to his satisfaction, by such investigation as he deems necessary, that an offense cognizable by him under A. W. 104 has been committed by a member of his command, will notify such member of the nature of such offense as clearly and concisely as may be, and inform him that he proposes to impose punishment under A. W. 104 as to such offense unless trial by court-martial for the same is demanded. The notification and information will be by written communication through proper channels in the case of an officer and may be by such communication in any case. If the notification, etc., is in writing, the accused will be directed to acknowledge receipt of the communication by indorsement through

the proper channels and to include in the indorsement any demand for trial he wishes to make. If the notification, etc., is not in writing, the accused will be given a reasonable time to make up his mind.

With reference to each offense as to which no demand for trial by court-martial is made, the commanding officer may proceed to impose punishment. The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal. (See 108.) If the original notification and information were in writing, the notification of the punishment imposed and any reprimand or admonition that may be included in such punishment, will be by indorsement on the communication carrying such original notification, etc., and the accused will be directed to acknowledge receipt by similar indorsement, and to include in his indorsement the date of such receipt, and any appeal (see 108) he may desire to make. If the notification of the punishment imposed is not in writing, the immediate commanding officer of the accused will be informed of the matter and given the necessary data for the record (see 109) of punishment.

108. DISCIPLINARY POWER OF COMMANDING OFFICER—Appeals.—

A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through proper channels, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. (A. W. 104.) An appeal not made within a reasonable time may be rejected by the "next superior authority." An appeal will be in writing through proper channels (see 107 as to appeal by indorsement), and will include a brief signed statement of the reasons for regarding the punishment as unjust or disproportionate. The immediate commanding officer of the accused will when necessary include with the appeal a copy of the record (see 109) in the case. The superior will, in passing upon the appeal, ordinarily hear no witnesses. When justice requires such action, he will modify the punishment or set it aside, but will not increase it, and will in no case award a different kind of punishment. After having considered the appeal, he will return the papers through channels to the appellant, with a statement of the disposition of the case and with direction to return the papers to his (the appellant's) immediate commanding officer for file with the record in the case.

109. DISCIPLINARY POWER OF COMMANDING OFFICER—Miscellaneous.—The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. Applications for mitigation or remission and any action taken under this

authority will be in writing and subject to the regulations as to appeals as far as applicable.

As to each offense for which punishment is imposed under A. W. 104, the immediate commanding officer of the person on whom such punishment was imposed will cause a record to be made and filed in his office or other proper place, showing the offense, with date and place of commission; the punishment, with the authority that imposed it and the date the accused received the notice of the imposition of the punishment; the decision of higher authority on any appeal; any mitigation or remission of the punishment; and any remarks or additional data desired.

With reference to pleading punishment imposed under A. W. 104 in bar of trial, see 69. With reference to showing punishment under A. W. 104 in extenuation, see 79.

A demand for trial does not require the preferring, transmitting, or forwarding of charges. As to noting demand for trial where charges are preferred, transmitted, or forwarded, see 27, 33, and 34.

CHAPTER XXV

COURTS-MARTIAL—RULES OF EVIDENCE

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111. COURTS-MARTIAL—RULES OF EVIDENCE—General Rules.—The rules stated in this chapter are applicable in cases before courts-martial, including summary courts-martial. Other rules of evidence so applicable are stated in various special connections throughout this manual, *e. g.*, 130 (Desertion). So far as not otherwise prescribed in this manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial.

On interlocutory questions other than challenges, the court may in its discretion relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writings of similar apparent authenticity and reliability, such as a physician's certificate of the illness of a witness, unless on objection to a particular writing it is made to appear that such relaxation might injuriously affect the substantial rights of an accused or the interests of the Government.

Evidence to be admissible must be material and relevant. Evidence is not material when the fact which it tends to prove is not part of the issues in the case. Evidence is not relevant when, though the fact which it is intended to prove thereby is material, yet the evidence itself is too remote or far-fetched to have any probative value for that purpose. If evidence is held immaterial or irrelevant to the issue of guilt or innocence, but is received in extenuation, it must be considered solely in connection with the measure of punishment in the event of conviction.

Evidence, apparently irrelevant, may be admitted provisionally upon a statement of the party offering it that other facts later to be proved will show its relevancy, but should afterward be excluded if its relevancy is not ultimately shown. However, it is generally safer, and will usually be found to save time and shorten the record in the end, to require the party offering the evidence first to prove the facts showing its relevancy. He may, for that purpose, be permitted temporarily to withdraw a witness or witnesses and to recall one or more witnesses who have been partially examined.

The court may, in its discretion, limit the number of witnesses called by either side to testify to the same matter. This rule especially applies to character witnesses.

112. COURTS-MARTIAL—RULES OF EVIDENCE—Presumptions; Direct and Circumstantial Evidence.—a. Presumptions.—Presumptions or inferences may be considered as falling into two classes: First, those which arise without the introduction of any evidence; and, second, those which can not arise until after some evidence has been introduced.

In the first class are those presumptions which relate to facts, the existence of which courts are bound to presume in the absence of evidence to the contrary. Thus, an accused person is presumed to be innocent until his guilt is proved beyond a reasonable doubt; an accused is presumed to have been sane at the time of the offense charged until a reasonable doubt of his sanity at the time appears from the evidence; and, in the absence of sufficient evidence to the contrary, a woman's chastity is presumed.

In the second class are those presumptions which relate to facts that a court may infer, if it deem such inference warranted by all the circumstances, from the existence of other facts which must, of course, be first established. In this connection see 112b (Circumstantial evidence). Following are examples of this second class of presumptions:

A sane person is presumed to have intended the natural and probable consequences of acts which he is shown to have committed.

Persons shown to be acting as public officers are presumed to be legally in office and to perform their duties properly.

Malice is presumed from the use of a deadly weapon.

A condition having been shown to have existed at one time, the general presumption arises, in the absence of any indication to the contrary, that such condition continues. Thus, in the absence of a showing to the contrary, it is presumed that one's residence remains unchanged, and that an office holder continues in office until the end of the term for which appointed or elected.

Proof that a letter correctly addressed and properly stamped or franked was deposited in the mail raises a presumption of delivery to the addressee, and a similar presumption arises with regard to telegrams regularly filed with a telegraph company for transmission.

Identity of name raises a presumption of identity of person, the strength of which presumption will, however, of course depend upon how common the name is, and upon other circumstances.

Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it.

The weight to be given presumptions of the second class necessarily depends upon all the circumstances attending the proved facts which give rise to the presumptions. For this reason the making and weighing of such presumptions and the consideration of evidence tending to overcome them call for the application by members of courts of their common sense and general knowledge of human nature and the ordinary affairs of life.

b. Direct and circumstantial evidence.—General.—If a statement made by a witness or contained in a document is such that if true it would directly prove or disprove a fact in issue, the statement is called direct evidence. If the statement would, if true, directly prove or disprove not a fact in issue but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact, which is in issue, then such a statement is called indirect or circumstantial evidence. For example, on a charge of larceny of a purse, testimony of a witness that he saw the accused take the purse from the owner's overcoat is direct evidence, and testimony of a witness that he found the purse hidden in the accused's locker is circumstantial evidence of the taking.

Circumstantial evidence is not resorted to as a secondary or inferior species; i. e., because there is an absence of direct evidence. It is admissible even when there is direct evidence. There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of an eyewitness, who is absolutely trustworthy in every respect, may be more convincing than the contrary inferences that appear probable from circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness.

Testimonial Knowledge.—A primary qualification in a witness is that he should speak only of what he has learned through his senses. For instance, a witness might testify that while on sentry post at night he heard three shots and saw two persons running in the distance; but he should not proceed further and state that the shots killed a mule, and that the accused was one of the persons running where his knowledge as to the effect of the shots and the identity of the persons running away is based on rumors and gossip heard the following day.

Opinion Evidence.—It is a general rule that a witness must state facts and not his opinions or conclusions. However, on matters within the common observation and experience of men, a witness may express an opinion; e. g., as to the speed of an automobile or as to whether or not a certain person was drunk at a certain time, or as to whether a voice heard was that of a man, woman, or child.

An expert witness—that is, one who is skilled in some art, trade, or science, or who has knowledge and experience in relation to matters which are not within the knowledge of men of common education and experience generally—may express an opinion on a state of facts which is within his specialty and which is involved in the inquiry. However, an expert witness should be qualified as such before the court, prior to being permitted to express his opinion.

Accused's Bad Character.—A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission.

There are certain exceptions to this rule, among them the following:

The accused may introduce evidence of his own good character, including evidence of his military record and standing in order to show the probability of his innocence, and if he does so the prosecution may introduce evidence in rebuttal.

If the accused takes the stand as a witness, his reputation for truth and veracity may be shown. See 124 (Impachment).

When criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged. The court should not consider evidence so offered as bearing in any way upon the question of the accused's character.

The following are illustrations of the rule and the exceptions:

On a charge of knowingly passing a counterfeit coin, evidence that the accused had on another recent occasion passed a counterfeit coin is admissible as tending to establish that on the instant occasion he knew the coin to be a counterfeit.

On a charge of assaulting a fellow soldier with intent to wound, a former assault on another soldier six months before and under entirely different circumstances would not be admissible, having no bearing on the intent in the case charged.

On a charge of attempt to desert, the fact that the accused had recently assaulted and beaten another soldier and was under arrest awaiting trial for the offense would be admissible as evidence of a probable motive to attempt to desert.

On a charge of falsification of accounts of stores, the fact that the accused had embezzled some of the same stores, if offered as evidence of a motive for concealing the embezzlement by falsifying accounts,

would be admissible; but evidence of a conviction of falsification before enlistment in a totally distinct transaction would be inadmissible, since such evidence bears solely upon his general moral character and not upon his present intent or motive.

113. COURTS-MARTIAL—RULES OF EVIDENCE—Hearsay rule.—a. General rule.—Hearsay is not evidence. By this rule is meant simply that a fact can not be proved by showing that somebody stated it was a fact. The fundamental reasons for the rule are that the author of the statement was not under oath, and was not subject to cross-examination, and that the court had no opportunity of observing his demeanor.

Of course the fact that a given statement was or was not made may itself be material. In such a case a witness may testify that such a statement was made, but not for the purpose of proving the truth of such statement.

b. Illustrations.—Captain A conducted the investigation of charges against the accused. Captain A's testimony at the trial that witnesses other than the accused, at the investigation, testified to certain facts, is inadmissible to prove such facts because Captain A's testimony, not being based upon his personal knowledge of such facts, would be hearsay. However, the testimony of any person present at the investigation that he heard the investigating officer inform the accused that he was not required to make any statement and that any statement he might make might be used against him, is admissible for the purpose of showing that a confession made by the accused at the investigation was voluntary. This is true because in the latter case the testimony is offered, not for the purpose of proving the truth of the statements made by the investigator, but merely to prove the fact that such statements were made to the accused. Here the testimony is not hearsay because the witness has personal knowledge of the fact sought to be proved by his testimony.

A soldier is being tried for larceny of clothes from a locker. Private A is able to testify that Private B told Private A that he, Private B, about the time the clothes were stolen, saw the accused leave the quarters with a bundle resembling clothes. Such testimony from Private A would be hearsay and would be inadmissible. Private B himself should be called.

The fact that the statement was made to an officer in the course of an official investigation does not make hearsay admissible. For instance, if Private B had made his statement to Captain C in the course of an official investigation by Captain C, the testimony of Captain C as to what Private B told him is hearsay and inadmissible.

A soldier is being tried for selling clothing. Policeman A is able to testify that, while on duty as policeman, he saw the accused with a bundle under his arm go into a shop, that he (the policeman)

entered the shop and the accused ran away and the policeman was unable to catch him, and that he (the policeman) the next day asked the proprietor of the shop what the accused was doing there, and the proprietor replied that the accused sold him some clothes issued by the Government, and that he paid the accused \$2.50 for them. The testimony of the policeman as to the reply of the proprietor would be hearsay and would be inadmissible. The fact that the policeman was acting in the line of his duty at the time the proprietor made the statement would not render the evidence admissible.

A soldier is being tried for disobedience of a certain order given him orally by Captain C. A person is able to testify that he heard Captain C give the order to the accused. Such testimony, including the terms of the order, is not hearsay and is not subject to exclusion for that reason.

Unless covered by one of the exceptions noted below, official statements made by an officer—as, for instance, by a company, regimental, or department commander, or by a staff officer, in an indorsement or other communication—are not excepted from the general rule by reason of the official character of the communication or the rank or position of the officer making it. Nor is such a statement so excepted because it is among papers referred to the trial judge advocate with the charges.

c. Exceptions.—Some of the exceptions to the hearsay rule which are usually presented for application in court-martial trials are stated or referred to in 114–119.

114. COURTS-MARTIAL—RULES OF EVIDENCE—Confessions; Accused's Admissions; Acts and Statements of Conspirators and Accomplices.—*a. Confessions.—General Observations.*—A confession is an acknowledgment of guilt. In view of the peculiar conditions in which accused persons are often placed when making confessions, evidence of confessions is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary, and if oral, is proved by a witness or witnesses by whom it has not been misunderstood and is not misrepresented, it is indeed one of the strongest forms of proof known to the law.

Courts should bear in mind that mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession.

Although a confession may be inadmissible as a whole because it was not voluntarily made, nevertheless the fact that it furnished information which led to the discovery of other evidence of pertinent facts will not be a reason for excluding such other evidence; and when such pertinent facts have thus been proved, so much of the accused's statement as relates strictly to those facts becomes admissible. For example, where an accused held for larceny said "I stole

the articles and I tore up a board in the floor of my room and I hid them there," the fact that the confession was improperly induced by promises or threats would not exclude evidence that the articles were discovered in the place indicated by him, and after the introduction of such evidence, it would be proper to prove that the accused made the statement, "I tore up a board in the floor of my room, and hid them there." The fact that a confession, otherwise admissible, was made to an investigating officer during an investigation of a charge, does not make the confession inadmissible.

Rules.—The following rules limit the use of an accused's confessions, oral or written, made out of court.

Evidence of a confession or supposed confession can not be restricted to evidence of only a part thereof. Where a part only is shown, the defense by cross-examination or otherwise may show the remainder so that the full and actual meaning of the confession or supposed confession may appear. For example, if in a trial for the common-law larceny of a horse the prosecution proves that the accused admitted that he broke into the stable and "stole" the horse, the defense may show that the accused added the statement that the horse was taken solely for a temporary purpose with the intent to return it.

An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the *corpus delicti* other than the confession itself. Usually such evidence is introduced before evidence of the confession; but a court may, in its discretion, admit the confession in evidence upon condition that it will be stricken out and disregarded in the event that the above requirement as to evidence of the *corpus delicti* is not met later. This evidence of the *corpus delicti* need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. Examples: If unlawful homicide is charged, evidence of the death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession if otherwise admissible. In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule.

It must appear that the confession was voluntary on the part of the accused. In the discretion of the court a *prima facie* showing to this effect may be required before evidence of the confession itself is received. No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.

A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made. Thus, where all the available evidence as to the circumstances merely shows that the accused, a private, confessed to a friend, another private, the confession may be regarded as voluntary.

The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior.

Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strong-minded soldier might not be influenced by words and circumstances which might influence an ignorant, dull-minded recruit.

Evidence that the accused stated that he made the confession freely without hope of reward or fear of punishment, etc., or evidence that the accused was warned just before he made the confession that his confession might be used against him or that he need not answer any questions that might tend to incriminate him is evidence, but not conclusive evidence, that the confession was voluntary.

b. Accused's admissions.—In many instances an accused has made statements which fall short of being acknowledgments of guilt, but which, nevertheless, constitute important admissions as to his con-

nection or possible connection with the offense charged. Such statements are called "admissions against interest" and are admissible in evidence without any showing that they were voluntarily made. Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement.

The following are examples of admissions against interest: A statement made after arrest by an accused charged with homicide in a dance hall, that he was in the hall when the homicide occurred; a statement made to a sheriff by an accused charged with desertion that he was "tired of working for the Government and did not want to work for it any longer."

The mere fact that the admission was made during an investigation of the charge does not make it inadmissible.

c. Acts and statements of conspirators and accomplices.—In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them. It is immaterial whether such acts or statements were done or made in the presence or hearing of the other parties. The acts and statements of a conspirator, however, done or made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape. Of course, this rule is not to be construed as affecting the competency of one accomplice to testify against the others. See 120 (Interest or bias).

Foundation must first be laid by either direct or circumstantial evidence sufficient to establish *prima facie* the fact of conspiracy between the parties. But as it sometimes may interfere with the proper development of the case to require the trial to begin with proof of the conspiracy, in such case the prosecution may, at the trial, prove the declarations and acts of one made and done in the absence of the others, before proving the conspiracy between the defendants, though such proof will be treated as nugatory unless the conspiracy be afterwards independently established.

The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission can not be considered as evidence against the others. The effect of an unsworn statement made by one of several joint offenders at the trial is likewise to be confined to the one who made it.

115. COURTS-MARTIAL—RULES OF EVIDENCE—Dying Declarations; Res Gestæ.—*a. Dying declarations.*—See 148 (Murder) and 149 (Man-slaughter).

b. Res gestæ.—Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed *res gestæ*. Evidence of anything constituting a part of the *res gestæ* is always admissible.

Thus, where an accused, A, is charged with the murder of B, evidence by any person who was present is admissible to show that immediately before the killing accused's wife exclaimed to him, "B has just assaulted me." This evidence is admissible because the making of the remark was substantially contemporaneous with the main fact under consideration—i. e., the alleged killing—and so closely connected therewith as to throw light upon its character in that the remark tends to indicate what motive was in the accused's mind, regardless of whether his wife had in fact been assaulted or not. In such a case, the evidence being introduced, not for the purpose of proving the truth of the remark, but merely to show that the remark was made, its admissibility does not constitute an exception to the hearsay rule.

It sometimes happens, however, that an utterance constituting a part of the *res gestæ* was made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously. In such a case evidence that the utterance was made may be introduced for the purpose of proving the truth of the utterance itself. This does constitute an exception to the hearsay rule. For example, an accused, A, is charged with having shot and killed B. A witness testifies that he, as well as A, B, and a fourth man, C, were present at the time of the shooting; that A and C had pistols; that he did not actually see the shot fired; that he was looking at B and not at A and C when he heard a shot, and saw B, who was looking toward A and C, fall; and that as B fell B exclaimed "A has shot me!" The testimony as to B's exclamation is admissible as part of the *res gestæ*; but, because of the circumstances under which the exclamation was made, the evidence may also be considered as tending to prove that it was A who shot B.

116. COURTS-MARTIAL—RULES OF EVIDENCE—Documentary Evidence; Proving Contents of Writing; Authentication of Writings.—*a. Proving contents of writing.*—*General Rule.*—A writing is the best evidence of its own contents, and must be introduced to prove its contents. Under this rule, if it is desired to prove the contents of a private letter or other unofficial paper, or of an official paper such as a pay voucher,

a written claim against the Government, a pay roll or muster roll, a company morning report, an enlistment paper, etc., the strict and formal method of doing so is to call a witness who can authenticate it, and then to introduce in evidence the original.

Exceptions.—If a writing has been lost or destroyed or if it is otherwise satisfactorily shown that the writing can not be produced, then the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing.

When the original consists of numerous writings which can not conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, the calculation may be made by some competent person and the result of the calculation testified to by him, as, for instance, if the fact to be proved is the balance shown by account books. In such cases it must be shown to the court that the writings are so numerous or bulky that they can not conveniently be examined by the court; that the fact to be proved is the general result of the whole collection; that the result is capable of being ascertained by calculation; that the witness is a person skilled in such matters, and capable of making the calculation; that he has examined the whole collection and has made such a calculation; and that the opposite party has had access to the books and papers from which the calculation is made. Opportunity will be afforded the opposite party to cross-examine the witness upon the books and papers in question, and to have them, or such of them as the cross-examiner may desire and the court may permit on proper showing (or properly authenticated or proved copies), produced in court for the purposes of the cross-examination.

In the case of a public record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without either first proving that the original has been lost or destroyed, or without otherwise accounting for the original.

Copies of any books, records, papers, and documents in any of the executive departments of the Government are duly authenticated by the seals of such departments.

A copy of any book, record, paper, or document in the War Department, including its bureaus and branches, or in any command or unit in the Army may be duly authenticated by the seal, inked stamp, or other identification mark of such department, bureau, branch, command, or unit, or by a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original. Thus "A true (extract) copy: (Sgd.) John Smith, Capt. 10th Inf. Comd'g., Co. A,

10th Inf." would be sufficient, *prima facie*, to authenticate a paper as a copy of an original company record of Company A, Tenth Infantry.

An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable; it does not appear that the preliminary matters described in the second subparagraph under this heading (Exceptions) have been shown to the court; it does not appear that a purported copy of a public record is duly authenticated.

b. Authentication of writings.—In order to prove that a writing is what it purports to be, in case of a private letter, the person who received the letter should testify that he received it, and he should identify it. Then it should be proved that the signature is in the handwriting of the purported writer of the letter. But in proving the genuineness of letters the rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed, is sufficient evidence of the genuineness of the reply to justify its introduction in evidence. A similar rule prevails as to telegrams purporting to be from the addressee of a prior telegram or telephone message.

If the writing is an official document such as a pay voucher, or an admissible photostat copy, it should be produced in court. The signature to the voucher (or as shown by the photostat copy thereof) should be proved to be genuine if that is not admitted.

Where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the court to prove or disprove such genuineness; but before admitting such specimens of handwriting, satisfactory evidence should be offered as to the genuineness of the same.

A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection.

117. COURTS-MARTIAL—RULES OF EVIDENCE—Documentary Evidence; Official Writings; Former Testimony.—*a. Official writings.*—*General Rule.*—It is to be borne in mind that the mere fact that a document is an official report does not in itself make it admissible in evidence for it is the hearsay assertion of a person not in court. Thus, neither the report of an investigating officer nor the accompanying summary of the testimony of a witness on a preliminary investigation of a charge is competent evidence of the facts therein stated. In this connection, however, see 114 (Confessions, admissions) and 124b (Impeachment).

Exceptions.—An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i. e., *prima facie*) evidence of such facts and events, without calling to the stand the officer or other person who made it. For instance, the originals of an enlistment paper, physical examination paper, outline-figure and fingerprint card, guard report, individual equipment record, and morning report are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge. As to copies, see 116 (Exceptions). A service record is not an original paper, so far as relates to facts compiled in it from other original sources, and therefore is not evidence of such facts. See, however, in this connection, 79c (Previous convictions) and 129 (Final indorsement on service record). A failure to object to a document on the ground that the information therein is compiled from other original sources may be regarded as a waiver of the objection.

A certificate by The Adjutant General, or one of his assistants, of any fact or event officially recorded in any book, record, paper, or document on file in the War Department or in any of its bureaus or branches, is *prima facie* evidence of such fact or event in any case in which The Adjutant General, or one of his assistants, shall certify that it is contrary to public policy to divulge the source of official knowledge of such fact or event or to divulge the text of the official record involved. See 125 (Judicial notice).

b. Former testimony.—A. to use of the record of the proceedings of a court of inquiry, see A. W. 27.

Where, at any trial by a court-martial, including a rehearing, it is made to appear to the satisfaction of the court that a witness who has testified in either a Federal or a State court or before a court-martial at a former trial of the same person where the issues were the same as in the case on trial and where the accused was confronted with the witness and afforded the right of cross-examination, is dead, insane, or too old or infirm to attend the trial, or is beyond the reach of process, or more than 100 miles from the place where the trial is had, or can not be found, his testimony at the former trial, if properly proved, may be received by the court if otherwise admissible, except that such testimony of an absent witness may not be introduced in evidence in a capital case without the consent of the accused unless the witness is dead or beyond the reach of process.

The testimony of a witness who has testified at a former trial by court-martial may be proved by the record of the former trial or by a duly certified copy of so much of such record as contains the desired testimony, and in any case the testimony may be proved by the stenographic report of such testimony verified by the person by whom it was reported. If in any case other competent proof is not available, the former testimony of such a witness may be proved by any person who heard the same being given and who remembers all or substantially all of it.

If otherwise admissible, a deposition taken for use or used at a former trial by a court-martial is admissible in a subsequent trial of the same person on the same issues.

118. COURTS-MARTIAL—RULES OF EVIDENCE—Documentary Evidence; Books of Account; Maps, Photographs, etc.—*a. Books of account.*—Entries in books of account, where such books are proven to have been kept in the regular course of business, and the entrant is dead, insane, out of the jurisdiction of the court, or otherwise unavailable to testify, are admissible as evidence. Also the lack of an entry in a series of written entries is admissible as an implied statement that no events occurred of the kind that would have been recorded.

Where the entrant is available to testify in court, books of account will be used, just as memoranda are used, for the purpose of either refreshing or supplying the recollection of the witness.

Where the entrant only records an oral report or written memorandum made in the regular course of business by another person or persons, such other person or persons, if available, must also be called to testify.

The original document of entry must be produced or accounted for. Where a composite entry is used, the extent to which intermediate memoranda must be produced depends on the circumstances of each case. As between ledger and daybook or other kinds of books, the book required is that which contains the first regular and collected record of the transactions.

b. Maps, photographs, etc.—Maps, photographs, sketches, etc., as to localities, wounds, etc., are admissible as evidence when properly verified by the party who made them, or by anyone personally acquainted with the locality, object, person, etc., thereby represented or pictured, and able to state their correctness, from his own personal knowledge or observation; or when coming from official sources that are authentic. This character of evidence is capable of gross misrepresentation of facts and should be carefully scrutinized. Fingerprints, upon proper verification, are admissible, but caution should be taken to use only witnesses skilled in interpreting fingerprints.

110. COURTS-MARTIAL—RULES OF EVIDENCE—Documentary Evidence; Depositions; Memoranda; Affidavits.—a. Depositions.—General.—See A. W. 25 and 26, and 98 (Interrogatories and depositions). Any case referred to a special court-martial for trial under the second proviso of A. W. 12 is a case "not capital" within the meaning of A. W. 25. The case is "not capital" within the meaning of A. W. 25 if none of the crimes or offenses charged is legally punishable by death; and although a crime or offense charged in the case is punishable by death under the Article of War denouncing it, such crime or offense is not legally so punishable, if the applicable limit of punishment prescribed by the President under A. W. 45 is less than death.

Deposition testimony may be introduced for the defense in capital cases if otherwise admissible. Where the defense calls for such testimony in capital cases, the witnesses may be cross-examined by interrogatories as fully as witnesses in a case not capital. Under express consent of the defense made or presented in court, but not otherwise, a court may admit deposition testimony not for the defense in a capital case. Except when express consent is required as just noted, failure to object to the introduction of a deposition on the ground that it was not authorized by A. W. 25 or was not taken before a proper officer or on reasonable notice may be regarded as a waiver of the objection.

The same rules as to competency of witnesses and admissibility of evidence apply in the taking of evidence by deposition that apply in the examination of a witness before the court, except that a wider latitude than usual should be allowed as to leading questions.

If the interrogatories and cross-interrogatories for depositions are submitted for acceptance by the court in open session, objection to the competency of the deponent, if grounds of objection are known at the time, as well as objections to questions, should be raised at such session and ordinarily be passed upon by the court at that time. The court should, however, in the interests of justice, entertain such objections when the depositions are offered in evidence.

If the interrogatories and cross-interrogatories were not so submitted, objections to the deposition as a whole or to a part thereof may be made when it is offered in evidence.

Offering Deposition.—The party at whose instance a deposition has been taken should not be permitted to offer only such parts of the deposition as are favorable to him or as he may elect to use; he must offer the deposition in evidence as a whole or not offer it at all. If the party at whose instance a deposition has been taken decides not to offer it, it may be offered by the other party.

Reading, etc., of Depositions.—Ordinarily a deposition will be read to the court by the side on whose behalf it was taken, but if the

accused is not represented by counsel, the trial judge advocate will read to the court the deposition taken on his behalf, unless the accused requests to read it or does not desire to offer it. After being read to the court a deposition will be properly marked as an exhibit with a view to incorporation in the record.

b. Memoranda.—Memoranda may be used to supply facts once known but now forgotten or to refresh the memory. Memoranda are therefore of two sorts: First, if the witness does not actually remember the facts but relies on the memorandum exclusively (as in the case of a bookkeeper using an old account book), then the witness must be able to state that the record accurately represented his knowledge at the time of its making. But it is not necessary that he should himself have made the record if he can state from his present recollection that it was correct when made, and the entries must have been made at or near the time, and the recollection at such time must have been fresh as to the facts recorded. Where the witness's certainty rests on his usual habit or course of business in making memoranda or records, it is sufficient. Second, if the witness can actually remember the facts and merely needs the memorandum to refresh his memory, or a part of it, then the above limitations do not apply. But the court should see to it that no attempt is made to use such a paper to impose a false memory on the court under guise of refreshing it.

A memorandum of the first sort is admissible. Where the memorandum is of the second sort, the witness will testify without the memorandum itself being admitted in evidence.

The memorandum to be used must always, on demand, be shown to the opponent for purposes of inspection and cross-examination.

c. Affidavits.—The general rule is that affidavits are not admissible; but there may be exceptions. See for examples of such exceptions the second subparagraph of 111 (Interlocutory questions), and 126c (Waiver of objection).

120. COURTS-MARTIAL—RULES OF EVIDENCE—Competency of Witnesses.—**a. General.**—The general capacity, mental and moral, of an adult witness is always presumed. The party alleging the contrary must always prove to the court the specific ground of incapacity or else the witness should be allowed to testify; that is, the burden of proof rests upon the party who alleges incompetency.

Any known objection to the witness's competency should be made before he is sworn. If his incompetency should later appear, however, a valid objection should be sustained, or the court, of its own motion, should refuse to hear him further, and order that any testimony he may have already given be disregarded.

b. Children.—The competency of children as witnesses is not dependent upon their age, but upon their apparent sense and their under-

standing of the moral importance of telling the truth. Such sense and understanding may appear upon such preliminary questioning of the child as the court deems necessary or from the child's appearance and testimony in the case.

c. Conviction of crime.—Conviction of an offense does not disqualify a witness, but may be shown to diminish his credibility. See 124*b* (Impeachment).

d. Interest or bias.—Interest or bias does not disqualify. For instance, the fact that a person owes a party money or has a property interest with or against a party does not disqualify him from testifying for or against that party; and a person who is an avowed friend or enemy of the accused is not thereby disqualified from testifying for or against the accused.

Wife and husband may testify in favor of each other without limitation; but unless both consent, neither wife nor husband is a competent witness against the other, except as follows: A wife may testify against her husband without his consent whenever she is the individual or one of the individuals injured by an offense charged against her husband. Thus in such cases as bodily injuries inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of wife and children, or failure to support them, or using or transporting her for "white slave" or immoral purposes, the wife may testify against her husband; but she can not be compelled to do so. See in this connection 123*b* (Privileged communications).

The accused is at his own request, but not otherwise, a competent witness. His failure to make such request shall not create any presumption against him. Upon taking the stand as a witness he occupies no exceptional status. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, etc., will apply to him as to any other witness. As to cross-examination of accused, see 121*b*.

One of two or more persons concerned in an offense is always competent to testify, whether he be charged jointly or separately and whether he be tried jointly or separately, and whether he be called for the prosecution or for the defense; except that he can not, if on trial himself, be called except upon his own request, and if not on trial himself he may assert his privilege not to incriminate himself. See in this connection 114*c* (Acts, etc., of conspirators, etc.) and 122*b* (Compulsory self-incrimination).

The fact that an accomplice testifies for the prosecution does not make him afterwards immune from trial except to the extent that immunity may have been promised him by an authority competent to order his trial by general court-martial.

121. COURTS-MARTIAL—RULES OF EVIDENCE—Examination of Witnesses.—a. General.—As to oaths of witnesses, see 95. Where a witness is recalled to the witness stand, he will not be sworn again, but should be reminded that he has been sworn in the case and is still under oath. A failure so to remind him, however, does not affect the validity of the trial and will not be ground for rejecting the testimony.

Subject to the discretion of the court, a witness before completing his testimony is not ordinarily permitted to be present in court during the introduction of other evidence or during the opening statements. The fact that a witness was so present may be commented upon in argument by either party, in relation to the weight to be given the evidence of the witness.

Witnesses are usually examined in the following order: Witnesses for the prosecution, witnesses for the defense, witnesses for the prosecution in rebuttal, witnesses for the defense in rebuttal, witnesses for the court. The order of examining each witness is usually direct examination, cross-examination, redirect examination, recross examination and examination by the court. However, the court may permit the recall of witnesses, including an accused, at any stage of the proceedings; it may permit material testimony to be introduced by either party quite out of its regular order and place, and may permit a case once closed by either or both sides to be reopened for the introduction of testimony previously omitted.

The court should not excuse a witness until satisfied that neither party has any further questions to ask him.

Refusal by a witness to answer a proper question is a military offense or an offense under A. W. 23 according to whether the witness is subject to military law or not.

It is never necessary for a party to ask questions through the court or ask that the court adopt a question.

A witness should be required to limit his answer to the question asked. He can not, however, be required to answer categorically (e. g., by a simple "yes" or "no") unless it is clear that such an answer will be a complete response to the question. A witness may always be permitted at some time before completing his testimony to explain any of his testimony.

The reason for any objection will ordinarily be stated.

With reference to questioning witnesses through an interpreter, see 47 (Duties of interpreter).

b. Cross; redirect and recross examination; examination by the court or a member.—Cross-examination.—Cross-examination should be limited to matters having a bearing upon the testimony of the witness on direct examination. As one purpose of cross-examination is to test the credibility of the witness, he may always be cross-examined as to

matters bearing upon his credibility, for instance, he may be interrogated as to his relationship to the parties and to the subject matter of the case, his interest, his motives, inclinations, and prejudices, his means of obtaining a correct and certain knowledge of the facts about which he testifies, the manner in which he has used those means, his powers of discernment, memory, and description. Leading questions may be freely used on cross-examination.

A witness, whatever be his rank or office, may be cross-examined. For instance, he may be asked in a proper case whether he has not expressed animosity toward the accused, or whether on a previous occasion he made a statement materially different from that embraced in his testimony. Such questions imply no disrespect to the witness, and he can not properly decline to answer them on that ground.

An accused person taking the stand as a witness becomes subject to cross-examination like any other witness. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses. When the accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination. The accused can not avail himself of his privilege against self-incrimination to escape proper cross-examination. Where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified.

Redirect and Recross Examination.—Ordinarily the redirect examination will be confined to matters brought out on the cross-examination, and the recross-examination will be confined to matters brought out on the redirect examination. But in these matters the court, in the interest of truth and justice, should be liberal in relaxing the rule.

Examination by the Court or a Member.—The court and its members may ask a witness other than the accused any questions that either side might properly ask such witness. If new matter, not properly the subject of cross-examination of such witness on his previous testimony, be elicited by questions of the court or its members, both parties will be permitted to cross-examine the witness upon such new matter.

In questioning an accused the court and its members must confine themselves to questions which would have been admissible on cross-examination of the accused by the prosecution.

Questions by the court or its members and evidence elicited thereby are subject to objection on proper grounds by either side and by members of the court.

c. Leading questions; ambiguous and misleading questions; other objectionable questions.—Leading Questions—General Rule.—Leading questions are questions which either suggest the answer it is desired the witness shall make, or which, embodying a material fact, are susceptible of being answered by a simple yes or no. A leading question except on cross-examination should be excluded upon proper objection. For example, where a knife is introduced in evidence a witness should not be asked on direct examination whether it is the knife with which he saw the accused stab Private A. He should be asked first whether he recognizes the knife, and if he answers that he does, then he may be asked where he saw it, and what was done with it, etc. A question may be none the less leading, although it includes the prefatory phrase "Did you or did you not."

Exceptions.—To abridge the proceedings, the witness may be led at once to points on which he is to testify. The rule is therefore not applicable to that part of the examination of a witness which is purely introductory. For example, in a desertion case, the policeman who supposedly apprehended the accused may be asked whether at a certain time and place he saw the accused.

When the witness appears to be hostile to the party calling him or is manifestly unwilling to give evidence, the court may, in its discretion, permit the party calling him to put leading questions. In this connection, see 124b (Impeachment).

When it appears that the witness had made an erroneous statement through a mere slip of the tongue, his attention may be directed to the matter by a leading question in order to afford him an opportunity to correct the statement if he so desires.

Where, from the nature of the case, the mind of the witness can not be directed to the subject of the inquiry without a particular specification of it, a leading question may be asked for that purpose. Thus, where a witness testified that he heard the accused make a certain statement on a certain occasion in the hearing of certain other persons, and such persons are called to contradict the witness, each of them may be asked whether he heard the accused make the statement.

In other cases the court, in its discretion, may allow liberal departures from the rule but must always be careful in so doing not to allow an untruthful witness an opportunity to shape his testimony as he thinks the questioner desires, or the reverse, or to try to match it up with the testimony of other witnesses, from suggestions he may gather during his examination, and not to allow either the trial

judge advocate or counsel for the accused, on direct examination, to intimate to a witness that his testimony on a material point is wrong, or ought to be changed except within the limits indicated above.

Ambiguous and Misleading Questions.—A question which is ambiguous or misleading should never be permitted either on direct or cross examination. Such a question is unfair to a witness, who may thereby be led into making an unintentional misstatement. Moreover his answer may give a wrong impression to the court. Included in ambiguous or misleading questions are those embodying two or more separate elements or questions. Thus the question "Did you see the accused leave the quarters with a bundle under his arm?" really contains four questions. Under certain circumstances the witness's affirmative or negative answer might be intended to apply only to one of the four questions involved and might be understood by the court to apply to all of them. Also included are questions which assume a fact not previously testified to by the witness. Thus the question "When you saw the accused was anyone with him?" would be improper unless the witness had previously testified that he had seen the accused.

Other Objectionable Questions.—Questions should not be asked for the purpose of suggesting matters known not to exist or that the rules of evidence clearly make inadmissible. See also 75a (Duties of court) and 122 (Degrading and incriminating questions).

122. COURTS-MARTIAL—RULES OF EVIDENCE—Degrading and Incriminating Questions.—*a. Compulsory self-degradation.*—Under A. W. 24 no witness or deponent need answer any question not material to the issue when such answer might tend to degrade him. This privilege applies only to matters not material—i. e., relevant to the issue—whereas the privilege against self-incrimination covers all matters whatsoever.

b. Compulsory self-incrimination.—The fifth amendment to the Constitution of the United States provides that in a criminal case no person shall be compelled "to be a witness against himself." The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness. See A. W. 24 as to prohibition against compelling a witness to incriminate himself or to answer any question the answer to which may tend to incriminate him.

If a witness states that the answer to a question might tend to incriminate him, he will not be required to answer the question unless it clearly appears to the court that no answer to the question could have that effect.

Although an answer to a question apparently would incriminate or tend to incriminate a witness, he can not refuse to answer where,

for instance, with respect to the offense as to which the privilege is asserted, he might successfully plead the statute of limitations, former trial, etc. See 67, 68, and 69. As to waiver of privilege by accused testifying in his own behalf, see 121b (Cross-examination).

The privilege of a witness to refuse to respond to a question the answer to which may incriminate him is a personal one, which the witness may exercise or waive as he may see fit. It is not for the trial judge advocate or accused to object to the question or to check the witness, or for the court to exclude the question or direct the witness not to answer, although the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him.

The prohibition against compelling one to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material.

It follows that it would be appropriate for the court to order the accused to expose his body for the examination by the court or by a surgeon who would later testify as to the results of his examination. Upon refusal to obey the order, the accused's clothing might be removed by force. The accused might likewise be compelled to try on clothing or shoes, or to place his bare foot in tracks, or to submit to having his fingerprints made.

123. COURTS-MARTIAL—RULES OF EVIDENCE—Privileged and Non-privileged Communications.—*a. General.*—A privileged communication is one that relates to matters occurring during a confidential relation which it is the public policy to protect. A witness can decline to answer a question touching such a communication, and where the privilege is that of the accused, or of the Government, or of any person other than the witness, the court will not permit the witness to answer such question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be.

b. Certain privileged communications.—*State Secrets and Police Secrets.*—Communications made by informants to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand and petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence, and, in general, all oral or written official communications, the disclosure of which would, in the opinion of the head of the executive department or independent bureau concerned, be detrimental to the public interest, are privileged.

The privilege that extends to communications made by informants to public officers engaged in the discovery of crime should be given a

common-sense interpretation, keeping in mind both the public interests and the interest of the accused.

Communications Between Husband and Wife and Between Attorney and Client.—Communications between husband and wife are privileged; therefore neither may testify to confidential communications of the other unless the other consent. See in this connection 120d (Interest or bias).

The testimony of the attorney or his interpreter, clerk, stenographer, etc., as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by a court, unless such communications clearly contemplate the commission of a crime; i. e., perjury, subornation of perjury, etc. Of course, communications prior to or subsequent to the relation are not privileged. The client, but not the attorney, may waive this privilege.

The purpose of the privilege, extended to communications between husband and wife and attorney and client, which grows out of a recognition of the public advantage that accrues from encouraging free communication in such circumstances, is not disregarded by allowing outside parties who overhear such privileged communications to testify to what they have overheard. It would not be permitted, however, for one of the minor children of the parents, who might reasonably be presumed by the parents not to understand what they were talking about, to testify to communications overheard by such child.

Confidential Papers.—The reports of special inspections by the Inspector General's Department are confidential documents and the testimony taken is considered a part and parcel of such reports. There is no law or regulation which requires copies of the evidence contained in these confidential reports to be furnished to officers whose conduct has been under investigation. So also the reports of The Judge Advocate General to the Secretary of War have always been regarded as confidential communications, and it has not been the practice to furnish copies of them to parties outside the department in the absence of special authority from the Secretary of War.

c. Certain nonprivileged communications.—Telegrams.—Neither private telegrams nor the information regarding them that comes to the knowledge of telegraph operators, either military or civil, are privileged. Telegraph operators, both military and civil, may be ordered or subpoenaed to testify before a court-martial as to private telegrams, and private telegrams may be brought before a court-martial by the usual process.

Communications to Medical Officers and Civilian Physicians.—It is the duty of medical officers of the Army to attend officers and

soldiers when sick, to make the annual physical examination of officers, and examine recruits for enlistment, and they may be specially directed to observe an officer or soldier or specially to examine or attend them. Such observations, examination, or attendance would be official and the information acquired would be official. While the ethics of the medical profession forbid them to divulge to unauthorized persons the information thus obtained, and the statements thus made to them, such information and statements do not possess the character of privileged communications.

The communications between civilian physician and patient are not privileged.

124. COURTS-MARTIAL—RULES OF EVIDENCE—Credibility of Witnesses; Impeachment of Witnesses.—*a. Credibility of witnesses.*—The credibility of a witness is his worthiness of belief, and is determined by his character, by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, by his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, by his friendships and prejudices, by his general reputation for truth and veracity in the community where he lives, by comparison of his testimony with other statements made by him out of court, by comparison of his testimony with that of others, etc. See in this connection 121b (Cross-examination). The court will draw its own conclusions as to the credibility of the witness and attach such weight to his evidence as his credibility may warrant. There may be cases in which the court would be justified in attaching no weight at all to the testimony of a witness. In general, a witness gains no corroboration merely by repeating his statements a number of times to the same effect. Hence, similar statements made by a witness prior to the trial consistent with his present testimony are in general not admissible to corroborate him. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. For example, if a witness is impeached on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his present testimony tends to show that his present testimony is not due to bias. So, also, where he is sought to be impeached on the ground of collusion or corruption the circumstances of the case may show that such prior statements have such evidential value as to make them admissible.

A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution.

b. Impeachment of witnesses.—General.—Impeachment signifies the process of attempting to diminish credibility. The credibility of any witness, including an accused, may be attacked.

The general rule is that a party is not permitted to impeach his own witness; that is, to attempt deliberately to discredit him. Such inconsistencies, however, as incidentally develop between witnesses for the same side are not impeachments. The general rule is subject to a few exceptions. Thus, where a party is compelled to call a witness whom the law, or circumstances of the case, make indispensable, or where a witness proves unexpectedly hostile to the party calling him, such party is permitted to impeach the witness. In the latter case it must first appear that the witness is hostile and that the party calling him has been surprised by the evidence given by the witness. The witness may then be asked if he has made inconsistent statements out of court, the time, place, and circumstances of the statement being described to him in detail, and upon his denial witnesses may be called in proof that he did make them. While a party surprised by the hostile evidence of his own witness may impeach such witness as indicated above, the party is not permitted to attack the reputation of such witness by showing that his general character is bad.

Various Grounds—General lack of veracity.—Where impeachment of a witness on this ground is undertaken, the impeaching evidence must be limited to evidence of his general reputation for truth and veracity in the community in which he lives or pursues his ordinary profession or business. In the military service "community" may include the witness's organization, post, or station. Personal opinion as to character is not admissible, except that a witness may, after testifying that he knows the reputation of the person in question as to truth and veracity in the community in which he resides or pursues his ordinary profession or business, and that such reputation is bad, be further asked whether or not from his knowledge of such reputation he would believe the person in question on oath. After such impeaching evidence, evidence that the witness's general reputation for truth and veracity in such community is good may be used in rebuttal.

Conviction of crime.—Evidence of conviction of any crime is admissible for the purpose of impeachment where such crime either involves moral turpitude or is such as to affect the credibility of the witness. Proof of such conviction may be made by the original or admissible copy of the record thereof or by an admissible copy of the order promulgating the sentence. Before introducing such proof, the witness must first be questioned with reference to the conviction sought to be shown, in order that he may have an opportunity of denying or of admitting and explaining it. If the witness admits the conviction, other proof is unnecessary. Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded.

-Inconsistent statements.—A witness may be impeached by showing by any competent evidence that he has previously made a statement inconsistent with his testimony on the stand. The foundation for the introduction of evidence of the making of an inconsistent oral statement must first be laid by asking the witness on cross-examination if he did not make the inconsistent statement, at the same time directing his attention to the time and place of such statement and the person to whom it was made. If the witness admits making the statement, no other proof that he made it is admissible. If he denies making the statement or testifies that he does not remember whether he made it or not, evidence that he made it may be introduced.

If the inconsistent statement is contained in a writing signed by the witness, the writing should be shown to the witness, and he should be asked to identify his signature thereon. If he admits his signature, the writing then becomes admissible in evidence. If he does not admit his signature, it may be otherwise proved, and the writing will then become admissible in evidence.

The fact that the inconsistent statement was made in the course of an investigation or at another trial does not make proof of the making of such statement inadmissible for purposes of impeachment.

Proof of the making of an inconsistent statement relating only to a collateral fact and not to any issue in the case is not admissible.

A witness has a right to explain any apparently inconsistent statement previously made by him and may, if excused from the stand, be recalled for that purpose.

Prejudice, bias, etc.—Prejudice, bias, friendship, former quarrel, relationship, etc., may be shown to diminish the credibility of the witness, either by the testimony of other witnesses or by cross-examination of the witness himself. Such matters are never regarded as collateral.

125. COURTS-MARTIAL—RULES OF EVIDENCE—Judicial Notice.—Certain kinds of facts need not be proved because the court is authorized to recognize their existence without proof. Such recognition is termed "Judicial notice."

The principal matters of which a court-martial may take judicial notice are as follows:

The Constitution, treaties, and other general laws of the United States; the law of nations; the common law; the laws of the State, Territory, or possession of the United States (including the District of Columbia) in which the court is sitting;

The great seal of the United States and those of its possessions and of the several States and Territories; the seals of all courts of record of the United States and its Territories and possessions and of the several States; the seal of a notary public; the seal of The Adjutant General's Office;

The ordinary divisions of time, as to years, months, weeks, etc.; general facts and laws of nature, including their ordinary operations and effects; and general facts of history;

The political organization of the Government of the United States and its Territories and possessions and of the several States and their chief officials; and current political conditions of war and peace;

The organization of the Army, including the regulations relating thereto, the Army Regulations, the Official Army Register, the Army List and Directory, the provisions of this and other official Army manuals, the existence and location of military departments, corps areas (service commands), reservations, posts, and stations of troops, as published to the Army; the fact that an officer belongs to a certain organization, branch, etc.;

General orders, bulletins, circulars, and general court-martial orders of the War Department; general orders, bulletins, circulars, and general court-martial orders of the authority appointing the court and of all higher authority; and

Price of articles issued or used in the Military Establishment when published to the Army in orders, bulletins, or price lists.

The seal of The Adjutant General's Office on a certificate is *prima facie* evidence that the signature thereon is that of The Adjutant General or one of his assistants.

The principle of judicial notice does not prohibit the court from receiving evidence of a fact of which it is authorized to take judicial notice, and, if not satisfied of the fact of which it is asked to take judicial notice, it may resort to any authentic source of information. For example, where the terms of a general order of the War Department are material, the court may send for a copy of the order.

It is customary for the side desiring the court to take judicial notice of a given fact to ask the court to do so, at the same time presenting any available authentic source of information on the subject.

126. COURTS-MARTIAL—RULES OF EVIDENCE—Miscellaneous Matters: Intent; Stipulations; Waiver of Objections.—*a. Intent.—General.*—In certain offenses, as murder, larceny, burglary, and desertion, a specific intent is a necessary element. In such a case the specific intent must be established either by independent evidence, as, for example, words proved to have been used by the offender, or by inference from the act itself.

In other offenses, as sleeping on post, drunkenness on duty, neglect of duty, and absence without leave, specific intent is not an element, and proof of the act alone is sufficient to establish guilt. Other illustrations and details as to evidence of intent in the more usual cases are included in Chapter XXVI (Punitive articles).

Drunkenness.—It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.

Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence.

As to proof of drunkenness, see 145 (Drunkenness on duty).

Ignorance of fact.—Ignorance or mistake of fact will exempt a person from criminal responsibility, provided always it is an honest ignorance or mistake and not the result of carelessness or fault on his part. Examples appear in Chapter XXVI (Punitive articles), c. g., 134.

Ignorance of Law.—Ignorance of the law is not an excuse for a criminal act. This rule may be partially relaxed by courts-martial in the trial for purely military offenses of soldiers recently enlisted.

For example, a recruit might be permitted to show that the Articles of War had never been read to him as required by A. W. 110. While such evidence would not amount to a defense, it could be regarded by the court as an extenuating circumstance.

b. Stipulations.—*As to facts.*—The parties may make a written or oral stipulation of the existence or nonexistence of any fact. A stipulation need not be accepted by the court, and should not be accepted where any doubt exists as to the accused's understanding of what is involved. A stipulation which practically amounts to a confession where the accused has pleaded not guilty and such plea still stands; and a stipulation of a fact which if true would operate as a complete defense to an offense charged should not ordinarily be accepted by the court. In a capital case and in other important cases a stipulation should be closely scrutinized before acceptance. The court is not bound by a stipulation even if received. For instance, its own inquiry may convince the court that the stipulated fact was not true. The court may permit a stipulation to be withdrawn. If so withdrawn, it is not effective for any purpose.

As to testimony and documentary evidence.—The parties may stipulate that if a certain person were present in court as a witness, he would give certain testimony under oath. See 52c in this connection (stipulation which warrants denial of continuance). Such a stipula-

tion does not admit the truth of such testimony, nor does it add anything to the weight of the testimony. Such stipulated testimony may be attacked or contradicted or explained in the same way as though the witness had actually so testified in person. The principles as to acceptance and withdrawal of stipulations as to facts apply here; but the court may be more liberal in accepting stipulations as to testimony.

Subject to the same observations as to stipulations as to testimony, stipulations may be made as to the contents of a document.

c. Waiver of objections.—The prosecution or the defense may in open court either orally or in writing waive an objection to the admissibility of offered evidence. Such a waiver adds nothing to the weight of the evidence nor to the credibility of its source. The court in its discretion may refuse to accept, and may permit the withdrawal of, any such waiver. There is no prescribed form for making a waiver. Thus, if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection. However, a waiver of an objection does not operate as a consent where consent is required, and a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual.

CHAPTER XXVI

PUNITIVE ARTICLES

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128. PRELIMINARY STATEMENT.—Articles 55, 56, 57, 60, 62, 70, 71, 72, 74, 75 (parts only), 76, 77, 78, 79, 80, 81, 87, 88, 90, 91 are omitted from this chapter, as the offenses denounced by them are of such infrequent occurrence. In case of any doubt with respect to such an offense that is not resolved by a reference to the pertinent Articles of War and any interpretations thereof that may be included in App. 1, and to the form of specification (App. 4), reference should be had to authoritative military precedents.

129. FIFTY-FOURTH ARTICLE OF WAR.

FRAUDULENT ENLISTMENT

Discussion.—A fraudulent enlistment is an enlistment procured by means of either a willful—i. e., intentional—misrepresentation in regard to any of the qualifications or disqualifications prescribed by law, regulation, or orders for enlistment, or a willful concealment in regard to any such disqualification.

Misrepresentation and concealment include any act, statement, or omission, which has the effect of conveying what is known by the applicant to be an untruth or of concealing what he knows to be the truth concerning his qualifications or disqualifications for enlistment.

Misrepresentation or concealment may be with respect to matters which, if truthfully stated or revealed, would induce an inquiry by the recruiting officer concerning the qualifications or disqualifications for enlistment, such as matters called for by questions as to previous service and previous applications for enlistment. Where a soldier again enlists without a discharge, he should be charged under A. W. 54 if he has received pay or allowances, otherwise he should be charged under A. W. 96. See 152a.

A person who procures himself to be enlisted by means of several willful misrepresentations and concealments as to his qualifications

for the one enlistment so procured and receives pay and allowances under such enlistment commits but one offense under A. W. 54.

Proof.—(a) The enlistment of the accused in the military service as alleged; (b) that the accused willfully—i. e., intentionally—misrepresented, or concealed a certain material fact or facts regarding his qualifications for enlistment as alleged; (c) that his enlistment was procured by such intentional misrepresentation or concealment; and (d) that under such enlistment the accused received either pay or allowances, or both, as alleged.

The receipt of pay or allowances should be proved by direct evidence if such evidence is reasonably available, but may be proved by circumstantial evidence—i. e., by merely showing that accused was on duty under such enlistment a sufficient time to warrant the inference that he had been fed or sheltered or both. Whatever was furnished accused while in confinement pending trial for the fraudulent enlistment, or transportation furnished accused for the convenience of the Government, is not considered an allowance.

Where concealment of a dishonorable discharge is alleged, the final indorsement on the service record is competent evidence of the dishonorable discharge.

Where it is sought to prove that the accused enlisted at various times under different names, his identity as the person so enlisting may be proved, *prima facie*, by photostat copies of the various enlistment and identification records with the certificate of The Adjutant General, or one of his assistants, as official custodian of such records, that the fingerprint records accompanying the various enlistment records have been compared by a duly qualified fingerprint expert on duty as such in his office and that such fingerprints are those of one and the same person. See 125 (Judicial notice).

Where an accused is being held under suspected fraudulent enlistment or desertion at a post where he is unknown, his fingerprints should be taken and forwarded to The Adjutant General for identification. In such a case the identity of the accused may be established, *prima facie*, by the testimony of the person who took such fingerprints or by some one who was present at the time they were taken, together with the certificate from the office of The Adjutant General as above provided. Of course, fingerprints are not the only method of identification. A witness may be available who has known the accused in his several enlistments and can identify him. So also signatures on the enlistment records, tattoo marks and scars on the body, peculiarities and deformities, may be used to establish identity.

190. FIFTY-EIGHTH ARTICLE OF WAR.

a. DESERTION

Discussion.—Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service.

Absence without leave with intent not to return.—Both elements are essential to the offense, which is complete when the person absents himself without authority from his place of service (which is for him "the service of the United States") with intent not to return thereto. A prompt repentance and return, while material in extenuation, is no defense. The fact that such intent is coupled with a purpose to return provided a particular but uncertain event happens in the future, or to report for duty elsewhere, or again to enlist, does not constitute a defense. Unless, however, an intent not to return to his place of duty exists at the inception of, or at some time during the absence, the soldier can not be a deserter, whether his purpose is to stay away a definite or an indefinite length of time. If a soldier while in desertion again enlists and deserts while serving under the second enlistment, he is amenable to trial for both desertions.

Under A. W. 28 any soldier who "without having first received a regular discharge again enlists in the Army or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army shall be deemed to have deserted the service of the United States." Such enlistment is not only no defense to a charge of desertion but is *prima facie* proof of it. His presence in the military service under such enlistment is not in itself a return to military control with respect to his former enlistment, although such return may be effected through his voluntary disclosure of the facts or through the discovery of the facts without his aid. For example, where such a deserter is confined by his commanding officer as a result of information received from the War Department, his desertion should be regarded as terminated by apprehension. In a case of a soldier enlisting without a discharge, the specification charging desertion should follow the usual form, the desertion being alleged as having occurred on the date accused absented himself without leave. If not absent without leave before he again enlisted, he becomes so absent at that time.

Absence without leave with intent to avoid hazardous duty or with intent to shirk important service.—Under A. W. 28 any person subject to military law who "quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter." The "hazardous duty" or "important service" may include such service of troops as strike or riot duty; etc.

ployment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster; embarkation for foreign duty or duty beyond the continental limits of the United States; and, under some exceptional circumstances such as threatened invasion, entrainment for duty on the border. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included.

Proof.—(a) That the accused absented himself without leave, or remained absent without leave from his place of service, organization, or place of duty, as alleged; (b) that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place, or to avoid hazardous duty, or to shirk important service as alleged; (c) that his absence was of a duration and was terminated as alleged; and (d) that the desertion was committed under the circumstances alleged: e. g., in the execution of a certain conspiracy or in time of war. As to time of war, see 125 (Judicial notice).

Absence without leave.—Absence without leave is usually proved, *prima facie*, by entries on the morning report. See 116 and 117 and W. D. A. G. O. Form No. 44. But the morning report, even though it refers to the accused as a "deserter," is not complete evidence of desertion; it is evidence only of absence without leave, and it is still necessary for the trial judge advocate to prove an intent to remain permanently absent, or else to avoid hazardous duty or to shirk important service. The condition of absence without leave with respect to an enlistment having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until the accused's return to military control under such enlistment. Where a soldier during one enlistment again enlists or attempts to enlist while on a duty status or while on pass or furlough, he by that act abandons such status of duty, pass, or furlough, and from that moment becomes absent without leave with respect to the former enlistment. Similarly a soldier absent on a short pass from his station who, for instance, is found on board a steamer bound for China may be regarded as having abandoned any authority he might have for such absence and to be absent without leave, although he may not have gone beyond the area fixed in the pass and the pass may not have expired.

Intent.—If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent. However, a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for a conviction of desertion. In such a case no inference of the intent not

to return arises from any admission involved in the plea, and therefore, to warrant conviction of desertion, evidence, such as evidence of a prolonged absence or other circumstances, must be introduced from which the intent in desertion can be inferred. Such inference may be drawn from such circumstances as that the accused attempted to dispose of his uniform or other property; that his civilian clothes were missing; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that he attempted to secure passage or to stow away on a ship; that while absent he was in the neighborhood of military posts and did not surrender to the military authorities; that he was dissatisfied in his company or with the military service; that he had made remarks indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; that just previous to absenting himself he stole or took without authority money, civilian clothes, or other property that would assist him in getting away. On the other hand, previous excellent and long service, the fact that none of the property of the accused was missing from his locker, and the fact that he was under the influence of intoxicating liquor or drugs when he absented himself, and that he continued for some time under their influence, etc., are circumstances which the court may regard as a basis for a contrary inference. Although accused may testify that he intended to return, such testimony is not compelling as the court may believe or reject the testimony of any witness in whole or in part. The fact that a soldier intends to report or actually reports at another station does not, on the one hand, prevent a conviction for desertion, as such fact in connection with other circumstances may tend to establish his intention not to return to his proper place of duty. On the other hand, a soldier absent without leave from his place of service and without funds may report to another station for transportation back to his original place of duty, and such a circumstance would, of course, tend to negative the existence of such intent. No general rule can be laid down as to the effect to be given to an intention to report or an actual reporting at another station.

Where the accused soldier enlisted without a discharge (see A. W. 28), the proof should include proof that the accused was a soldier in a certain organization of the Army; and that, without being discharged from such organization, he again enlisted in the Army, or in the militia when in the service of the United States, or in the Navy, or the Marine Corps of the United States, or in some foreign army. For the method of proving the fact that accused was not discharged from his prior enlistment, see 182a (Disorders and neglects, etc.).

6. ATTEMPTING TO DESERT

Discussion.—An attempt to desert is an overt act other than mere preparation toward accomplishing a purpose to desert. The attempt to desert may be with the intent not to return, to avoid hazardous duty, or to shirk important service. Once the attempt is made, the fact that the soldier desists, either of his own accord or otherwise, does not obliterate the offense. An instance of the offense is: A soldier intending to desert hides himself in an empty freight car on the post, intending to effect his escape from the post by being taken out in the car. Entering the car with intent to desert is the overt act. See discussion of desertion.

Proof.—(a) That the accused made the attempt by doing the overt act or acts alleged; (b) that he intended to desert at the time of doing such act or acts; that is, he then entertained the intent not to return, or the intent to avoid hazardous duty or to shirk important service as alleged; (c) that the attempt was made under the circumstances alleged; e. g., in the execution of a certain conspiracy or in time of war. As to time of war, see 125 (Judicial notice). See comments under Proof of desertion.

131. FIFTY-NINTH ARTICLE OF WAR.

ADVISING, PERSUADING, OR ASSISTING DESERTION

Discussion.—See 130.

The offenses of persuading and assisting desertion are not complete unless the desertion occurs; but the offense of advising is complete when the advice is given, whether the person advised deserts or not.

It is not necessary that the accused act alone in giving the advice or assistance or in the persuasion; and he may act through other persons in committing the offenses.

Proof.—(a) That the accused in the manner and form alleged, advised, used persuasion to induce, or knowingly assisted a certain person subject to military law to desert as alleged; (b) if charged with persuading or assisting desertion, that such certain person deserted as alleged (see Proof of desertion), and, where persuasion is alleged, that he was induced to do so by such persuasion; and (c) that the act of advising, persuading, or assisting was done, if so alleged, in time of war. See, however, paragraph 125 (Judicial notice).

132. SIXTY-FIRST ARTICLE OF WAR.

ABSENCE WITHOUT LEAVE

Discussion.—The article is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at

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a time when he should be there. The first part of the article—that relating to the properly appointed place of duty—applies whether such place is appointed as a rendezvous for several or for one only. Thus it would apply in the case of a soldier failing to report as the kitchen police or leaving such duty after reporting.

A soldier turned over, upon application under A. W. 74, to the civil authorities, is not absent without leave while held by them under such delivery. So, also, where a soldier, being absent with leave, or absent without leave is held, tried, and acquitted by the civil authorities, his status as absent with leave, or absent without leave, is not thereby changed however long he may be held. Where a soldier is convicted by the civil authorities, the fact that he was arrested, held, and tried does not excuse any unauthorized absence, and the status of absence without leave is not changed by an inability to return through sickness, or lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary, should be given due weight when considering the punishment to be imposed.

Proof.—Where the accused fails to appear at or goes from a place of duty—

(a) That a certain authority appointed a certain time and place for a certain duty by the accused, as alleged; and (b) that the accused failed to report to such place at the proper time, or, having so reported, went from the same without authority from anyone competent to give him leave to do so.

Where the accused is charged with absenting himself without proper leave—

(a) That the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave.

Where the accused is charged with absenting himself without proper leave from his guard with intent to abandon the same—

(a) That the accused absented himself from his guard as alleged; (b) that such absence was without authority from anyone competent to give him leave; and (c) the facts and circumstances of the case indicating that the accused intended to abandon his guard.

183. SIXTY-THIRD ARTICLE OF WAR.

DISRESPECT TOWARD A SUPERIOR OFFICER

Discussion.—The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.

It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

The officer toward whom the disrespectful behavior was directed must have been the superior of the accused at the time of the acts charged; but by superior is not necessarily meant a superior in rank, as a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer, such as a medical officer.

Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. (Winthrop.)

Where the accused did not know that the person against whom the acts, etc., were directed was his superior officer, such lack of knowledge is a defense.

Proof.—(a) That the accused did or omitted to do certain acts or used certain language to or concerning a certain officer, as alleged; (b) that the behavior involved in such acts, omissions, or words was, under certain circumstances, or in a certain connection, or with a certain meaning, as alleged; and (c) that the officer toward whom the acts, omissions, or words were directed was the accused's superior officer.

134. SIXTY-FOURTH ARTICLE OF WAR.

a. ASSAULTING SUPERIOR OFFICER

Discussion.—The phrase “on any pretense whatsoever” is not to be understood as excluding as a defense the fact that the striking was done in legitimate self-defense or in the discharge of some duty, such as is enjoined by A. W. 67.

By “superior officer” is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

The word “strikes” means an intentional blow with anything by which a blow can be given.

The phrase “draws or lifts up any weapon against” covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word “draw” is no doubt the sword; the term might, however, apply to a bayonet in a sheath or to a pistol,

and the drawing of either in an aggressive manner or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening manner of a firearm (whether or not loaded) or of a club, or of any implement or thing by which a serious blow could be given, would be within the description, "lifts up." (Winthrop.)

The phrase "offers any violence against him" comprises any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article. (Winthrop.)

An officer is in the execution of his office "when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage." (Winthrop.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office.

Proof.—(a) That the accused struck a certain officer, or drew or lifted up a weapon against him, or offered violence against him, as alleged; (b) that such officer was the accused's superior officer at the time; and (c) that such superior officer was in the execution of his office at the time.

6. DISOBEYING SUPERIOR OFFICER

Discussion.—The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A. W. 96. Where the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under A. W. 64, although carrying out such an intention may be.

The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

A person can not be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate. Disobedience of an illegal order might under some circumstances involve an act of insubordination properly chargeable under A. W. 96.

That obedience to a command involved a violation of the accused's religious scruples is not a defense.

Failure to comply with the general or standing orders of a command, or with the Army Regulations, is not an offense under this article, but under A. W. 96; and so of a nonperformance by a subordinate of any mere routine duty.

The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

Proof.—(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command.

135. SIXTY-FIFTH ARTICLE OF WAR.

a. ASSAULTING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

Discussion.—This article has the same general objects with respect to warrant officers and noncommissioned officers as A. W. 63-64 have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect.

The terms "willfully disobeys," "lawful," and "in the execution of his office" are used in the same sense as in A. W. 64; and the term "order" is used in the same sense as "command" in A. W. 64.

For definition of assault, see 149/. The part of the article relating to assaults covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application.

Proof.—(a) That the accused soldier struck a certain warrant officer or noncommissioned officer as alleged, or assaulted or attempted or threatened to strike or assault him in a certain manner, as alleged; and (b) that such violence was done, attempted, or threatened while such warrant officer or noncommissioned officer was in the execution of his office.

DISOBEYING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

Discussion.—See discussion under 135a.

Proof.—(a) That the accused soldier received a certain order from a certain warrant officer or noncommissioned officer, as alleged; and (b) that such order was given while such warrant officer or noncommissioned officer was in the execution of his office; and (c) that the accused soldier willfully disobeyed such command. An order from a warrant officer or a noncommissioned officer in the execution of his office is presumed to be a lawful order.

c. USING THREATENING OR INSULTING LANGUAGE OR BEHAVING IN AN INSUBORDINATE OR DISRESPECTFUL MANNER TOWARD A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

Discussion.—The word "toward" limits the application of this part of the article to language and behavior within sight or hearing of the warrant officer or noncommissioned officer concerned; the word not being used in the same sense as in A. W. 63.

Proof.—(a) That the accused used language or did or omitted to do acts under certain circumstances, or in a manner, or with an intended meaning, as alleged; (b) that such language or behavior was used toward a certain warrant officer or noncommissioned officer; and (c) that such warrant officer or noncommissioned officer was in the execution of his office at the time.

136. SIXTY-SIXTH ARTICLE OF WAR.

a. ATTEMPTING TO CREATE A MUTINY OR SEDITION

Discussion.—Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. Sedition implies the raising of commotion or disturbance against the State; it is a revolt against legitimate authority and differs from mutiny in that it implies a resistance to lawful civil power.

The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent.

An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of, its consummation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt while material in extenuation is not a defense.

The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others. The intent to create a mutiny or sedition may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny or sedition and so be guilty of an attempt to create a mutiny or sedition, alike whether he was joined by others or not, or whether a mutiny or sedition actually followed or not.

Proof.—(a) An act or acts of accused which proximately tended to create a certain intended (or actual) collective insubordination; (b) a specific intent to create a certain intended (or actual) collective insubordination; and (c) that the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command in the Army of the United States.

b. BEGINNING OR JOINING IN A MUTINY OR SEDITION

Discussion.—See 136a. There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.

Proof.—(a) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States; and (b) that the accused began or joined in such certain collective insubordination.

c. CAUSING OR EXCITING A MUTINY OR SEDITION

Discussion.—See 136a. As in 136b, no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities.

Proof.—(a) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States; and (b) acts of the accused tending to cause or excite the certain collective insubordination.

137. SIXTY-SEVENTH ARTICLE OF WAR.**a. FAILURE TO SUPPRESS MUTINY OR SEDITION**

Discussion.—See 136. The article applies only to officers and soldiers. Similar acts or omissions by other persons subject to military law are chargeable under A. W. 96.

One is not present at a mutiny unless an act or acts of collective insubordination occur in his presence.

The article requires of an officer or soldier "his utmost endeavor" to suppress a mutiny or sedition at which he is present. Where such extreme measures are reasonably necessary under the circumstances, the use of a dangerous weapon and the taking of life are required; but the use of more force than is reasonably necessary under the circumstances is an offense. See 149a (Manslaughter).

Proof.—(a) The occurrence of an act or acts of collective insubordination in the presence of the accused; and (b) acts or omissions of the accused which constitute a failure to use his utmost endeavor to suppress such acts.

b. FAILURE TO GIVE INFORMATION OF MUTINY OR SEDITION

Discussion.—See 137a. Where circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was impending, these circumstances will be sufficient to charge the accused with such "reason to believe" as will render him culpable under the article.

It is not a necessary element of the crime that the impending mutiny or sedition materialize.

"Delay" imports the lapse of an unreasonable time without action.

Proof.—(a) That the accused knew that a mutiny or sedition was impending or that he knew of circumstances that would have induced, in a reasonable man, a belief that a mutiny or sedition was impending; and (b) acts or omissions of the accused which constitute a failure or unreasonable delay in informing his commanding officer of his knowledge or belief.

138. SIXTY-EIGHTH ARTICLE OF WAR.**a. DISOBEDIENCE OF ORDERS INTO ARREST OR CONFINEMENT**

Discussion.—A fray is a fight in a public place to the terror of the people, in which acts of violence occur or dangerous weapons are exhibited or threatened to be used. All persons aiding or abetting a fray are principals. The word "fray" is thus seen to be somewhat restrictive, but the words "quarrels" and "disorders" include any disturbance of a contentious character from a mere war of words to a rout or riot.

It is immaterial under the article whether the officer or other person who essays to part or quell a quarrel, fray, or disorder is on a duty status or not, as it is immaterial whether the persons engaged in the quarrel, etc., are superior to him in rank or not.

It should appear that the power conferred by the article was being exercised for the purpose stated, and therefore the charges and proof should refer to the order given during the disorder. It should be made to appear that the accused heard or understood the order and knew that the person giving it was an officer or noncommissioned officer, or other person thereunto authorized by the article.

Proof.—(a) That the accused was a participant in a certain quarrel, fray, or disorder occurring among persons subject to military law; (b) that during the disorder a certain officer, or other authorized person, ordered the accused into arrest or confinement as alleged, with a view to quell or part the disorder; and (c) that the accused refused to obey.

b. THREATENING, DRAWING A WEAPON UPON, OR OFFERING VIOLENCE TO, AN OFFICER, MEMBER OF THE ARMY NURSE CORPS, WARRANT OFFICER, BAND LEADER, OR NONCOMMISSIONED OFFICER

Discussion.—See discussion in 184, 185, and 188a. The word "threat" as here used includes any menacing action, either by gesture or by words.

Proof.—The proof of the second, third, and fourth crimes defined by the article should follow in form and essentials the proof in 188a, except that, instead of proving a refusal to obey, drawing a weapon, making a threat, or doing violence must be proved as the consummation of the particular offense.

189. SIXTY-NINTH ARTICLE OF WAR.

a. BREACH OF ARREST

Discussion.—The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed. In arrest the restraint is moral restraint imposed by the orders fixing the limits of arrest or by the terms of the article. Confinement imports some physical restraint.

The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, or by A. W. 69, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertance or bona fide mistake is admissible in extenuation. Innocence of the offense with respect to which an arrest or confinement may have been imposed is not a defense. A person can not be convicted of a violation of this article

if the arrest or confinement was in fact illegal. However, the circumstances of a breach of an illegal restraint may subject the person breaking such restraint to a prosecution under some other article. For example, where a prisoner in making an escape assaults a sentinel, the fact that the confinement was illegal would not be a defense to a prosecution for the assault. It is immaterial whether the breach of arrest or escape from confinement took place before or after trial, acquittal, or sentence. A violation of a restraint on liberty other than arrest or confinement—for example, the restraint imposed on a prisoner paroled to work within certain limits—should be charged under A. W. 96.

Proof.—(a) That the accused was duly placed in arrest; and (b) that before he was set at liberty by proper authority he transgressed the limits fixed by A. W. 69 or by the orders of proper authority. An arrest is presumed to be legal.

b. ESCAPE FROM CONFINEMENT

Discussion.—See 189a. (Breach of arrest). An escape may be either with or without force or artifice, and either with or without the consent of the custodian. Any completed casting off of the restraint of confinement, before being set at liberty by proper authority, is an escape from confinement, and a lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt. An escape is not complete until the prisoner has, momentarily, at least, freed himself from the restraint of his confinement; so, if the movement toward escape is opposed, or before it is completed an immediate pursuit ensues, there will be no escape until opposition is overcome or pursuit is shaken off. In cases where the escape is not completed the offense should be charged as an attempt under A. W. 96.

Proof.—(a) That the accused was duly placed in confinement; and (b) that he freed himself from the restraint of his confinement before he had been set at liberty by proper authority. A confinement is presumed to be legal.

140. SEVENTY-THIRD ARTICLE OF WAR.

a. RELEASING A PRISONER WITHOUT PROPER AUTHORITY

Discussion.—The words “any prisoner” include a civilian or military prisoner.

While a commander of the guard must receive a prisoner properly committed by any officer, the power of the committing officer ceases as soon as he has committed the prisoner, and he is not, as such committing officer, a “proper authority” to order a release.

An officer may receive in his charge a prisoner not committed in strict compliance with the terms of A. W. 71 or other law, and such prisoner having been so received has been "duly committed."

Proof.—(a) That a certain prisoner was duly committed to the charge of the accused; and (b) that the accused released him without proper authority.

b. SUFFERING A PRISONER TO ESCAPE THROUGH NEGLIGENCE

Discussion.—See 140a. The word "neglect" is here used in the sense of the word "negligence."

Negligence is a relative term. It is defined in law as the absence of due care. The legal standard of care is that which would have been taken by a reasonably prudent man in the same or similar circumstances. This test looks to the standard required of persons acting in the capacity in which the accused was acting. Thus, if the accused is an officer, the test will be, "How would a reasonably prudent officer have acted?" If the circumstances were such as would have indicated to a reasonably prudent officer that a very high order of care was required to prevent escape, then the accused must be held to a very high order of care. The test is thus elastic, logical, and just.

A prisoner can not be said to have escaped until he has overcome the opposition that restrained him and shaken off immediate pursuit. If he escapes, the fact that he returns, is taken in a fresh pursuit, is killed, or dies, is not a defense to a charge of having suffered him to escape through neglect.

Proof.—(a) That a certain prisoner was duly committed to the charge of the accused; (b) that the prisoner escaped; (c) that the accused did not take such care to prevent escape as a reasonably prudent person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and (d) that the escape was the proximate result of the neglect of the accused.

c. SUFFERING A PRISONER TO ESCAPE THROUGH DESIGN

Discussion.—See 140a and b. In law a wrongful act is designed when it is intended or when it results from conduct so shockingly and grossly devoid of care as to leave room for no inference but that the act was contemplated as an extremely probable result of the course of conduct followed. Thus, on a charge of suffering a prisoner to escape through design, evidence of gross negligence may be received as probative of design.

It sometimes happens that a prisoner has been permitted larger limits than should have been allowed, and an escape is consummated without hindrance. It does not at all follow that such an escape is to be considered as designed. The conduct of the responsible custodian is to be examined in the light of all the circumstances of the case, the gravity of the crime with which the prisoner is charged, the probability of his return, and the intention and motives of the custodian.

Proof.—(a) That a certain prisoner was duly committed to the charge of the accused; (b) a design of the accused to suffer the escape of such prisoner; and (c) that the prisoner escaped as a result of the carrying out of such design.

141. SEVENTY-FIFTH ARTICLE OF WAR.

a. MISBEHAVIOR BEFORE THE ENEMY

Discussion.—Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article.

"The enemy" imports any hostile body that our forces may be opposing, such as a rebellious mob, a band of renegades, or a tribe of Indians. Whether a person is "before the enemy" is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire. On the other hand, an organization some distance from the front, and which is not a part of a tactical movement then going on or in immediate prospect, is not "before the enemy" within the meaning of this article.

Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy.

Proof.—(a) That the accused was serving in the presence of an enemy; and (b) acts or omissions of the accused as alleged.

b. RUNNING AWAY BEFORE THE ENEMY

Discussion.—See 141a.

Proof.—(a) That the accused was serving in the presence of an enemy; and (b) that he misbehaved himself by running away.

142. EIGHTY-SECOND ARTICLE OF WAR.**BEING A SPY**

Discussion.—The words "any person" bring within the jurisdiction of courts-martial and military commissions all persons of whatever nationality or status who may be accused of the offense denounced by the article.

The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party. Thus, soldiers not wearing disguise, dispatch riders, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise in order to reach his own lines.

It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.

"A spy, who, after rejoining the army to which he belongs, is subsequently captured by the enemy * * * incurs no responsibility for his previous acts of espionage." (Rules of Land Warfare.)

A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the enemy, may be charged under A. W. 81 with communicating or giving intelligence to the enemy, but he may not be charged under this article with being a spy.

Proof.—(a) That the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses; and (b) that he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy.

143. EIGHTY-THIRD ARTICLE OF WAR.**SUFFERING MILITARY PROPERTY TO BE LOST, ETC.**

Discussion.—The loss, etc., may be said to be willfully suffered by one, who, knowing the loss, etc., to be imminent or actually going on, takes no steps to prevent it, as where a sentinel seeing a small and readily extinguishable fire in a stack of hay on his post allows

it to burn up. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc.

The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc. (Winthrop.)

Proof.—(a) That certain military property belonging to the United States was lost, spoiled, damaged, or wrongfully disposed of in the manner alleged; (b) that such loss, etc., was suffered by the accused through a certain omission of duty on his part; (c) that such omission was willful, or negligent, as alleged; and (d) the value of the property, as alleged.

Although there may be no direct evidence that the property was military property belonging to the United States, still circumstantial evidence such as evidence that the property shown to have been lost, spoiled, damaged, or wrongfully disposed of by the accused was of a type and kind issued for use in, or furnished and intended for the military service, might warrant the court in inferring that it was such military property.

144. EIGHTY-FOURTH ARTICLE OF WAR.

a. SELLING OR WRONGFULLY DISPOSING OF MILITARY PROPERTY

Discussion.—The article applies to any property issued for use in the military service, and the fact that the property sold, disposed of, lost, or injured was issued to someone other than the accused is immaterial. "Clothing" includes all articles of clothing whether issued under a clothing allowance or otherwise.

Proof.—(a) That the accused soldier sold or otherwise disposed of certain property in the manner alleged; (b) that such disposition was wrongful; (c) that the property was issued for use in the military service; and (d) the value of the property as alleged.

Although there may be no direct evidence that the property was issued for use in the military service, still circumstantial evidence such as evidence that the property shown to have been sold or otherwise disposed of by the accused soldier was of a type and kind issued for use in the military service might warrant the court in inferring that it was so issued.

A. WILLFULLY OR THROUGH NEGLIGENCE INJURING OR LOSING MILITARY PROPERTY

Discussion.—See 144a. A willful injury or loss is one that is intentionally occasioned. A loss or injury is occasioned through neglect when it is the result of a want of such attention to the nature or probable consequences of an act or omission as was appropriate under the circumstances.

Proof.—(a) That certain property was injured in a certain way or lost, as alleged; (b) that such property was issued for use in the military service; (c) that such injury or loss was willfully caused by the accused in a certain manner, as alleged; or that such injury or loss was the result of neglect on the part of the accused; and (d) the value of the property, as alleged.

Where it is shown by either direct or circumstantial evidence that the property was issued to the accused, it may be presumed that the injury or loss shown unless satisfactorily explained was due to the neglect of the accused.

145. EIGHTY-FIFTH ARTICLE OF WAR.

BEING FOUND DRUNK ON DUTY

Discussion.—Under this article it is necessary that accused be found to be drunk while actually on duty, but the fact that he became drunk before going on duty while material in extenuation is immaterial on the question of guilt. A person is not found drunk on duty in the sense of this article, "if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all." (Winthrop.) But the article does apply although the duty may be of a merely preliminary or anticipatory nature, such as attending an inspection by a soldier designated for guard, or an awaiting by a medical officer of a possible call for his services.

The term "duty" as used in this article means of course military duty. But, it is important to note, every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. (Winthrop.)

The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. In the case of other officers, or of enlisted men, the term "on duty" relates to duties of routine or detail, in garrison or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known to the service as "off duty." (See Davis.)

In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article.

So, also, an officer of the day and members of the guard are on duty during their entire tour within the meaning of this article, but a sentinel found drunk on post should ordinarily be charged under A. W. 86.

The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article.

Whether the drunkenness was caused by liquor or drugs is immaterial; and any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article.

Proof.—(a) That the accused was on a certain duty, as alleged, and (b) that he was found drunk while on such duty.

On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion.

146. EIGHTY-SIXTH ARTICLE OF WAR.

a. BEING FOUND DRUNK ON POST

Discussion.—See 145.

The term "sentinel" does not include a watchman or an officer or a noncommissioned officer of the guard unless posted as such.

A sentinel is on post within the meaning of this article not only when he is walking a duly designated sentinel's post, as is ordinarily the case in garrison, but also, for example, when he may be stationed in observation against the approach of an enemy, or on post to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article.

The fact that the sentinel was not posted in the regular way is not a defense.

Proof.—(a) That the accused was posted as a sentinel, as alleged; and (b) that he was found drunk while on such post.

b. BEING FOUND SLEEPING ON POST

Discussion.—See 146a. The fact that the accused had been previously overtaxed by excessive guard duty is not a defense, although evidence to that effect may be received in extenuation of the offense.

Proof.—(a) That the accused was posted as a sentinel, as alleged; and (b) that he was found sleeping while on such post.

c. LEAVING POST BEFORE BEING RELIEVED

Discussion.—Sec 146a. The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post.

Proof.—(a) That the accused was posted as a sentinel, as alleged; and (b) that he left such post without being regularly relieved.

147. EIGHTY-NINTH ARTICLE OF WAR.

a. COMMITTING ANY WASTE OR SPOIL

Discussion.—The terms “waste” or “spoil” as used in this article refer to such acts of voluntary destruction of or permanent damage to real property as burning down buildings, tearing down fences, cutting down shade or fruit trees, and the like.

Proof.—(a) That the accused being with a certain command in quarters, camp, garrison, or on the march, committed waste or spoil on certain property in the manner alleged; and (b) that such acts were not ordered by his commanding officer.

b. WILLFULLY DESTROYING PROPERTY

Discussion.—To be destroyed it is not necessary that the property be completely demolished or annihilated. It is sufficient if it is so far injured as to be useless for the purpose for which it was intended.

Proof.—(a) That the accused being with a certain command in quarters, camp, garrison, or on the march, destroyed certain property, as alleged; and (b) that such destruction was willful and was not ordered by his commanding officer.

c. COMMITTING DEPREDAATION OR RIOT

Discussion.—The term “any kind of depredation” includes plundering, pillaging, robbing, and any willful damage to property not included in the preceding specific terms of the article.

A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. (McClain, Crim. Law.)

Proof.—That the accused being with a certain command in quarters, camp, garrison, or on the march, committed certain acts of depredation on certain property, or certain acts of rioting, as alleged.

d. REFUSING OR OMITTING TO SEE REPARATION MADE

Discussion.—Refusing to entertain a proper complaint at all; refusing or omitting to convene a board for the assessment of damage; or to act on such proceedings, or to direct the proper stoppages, are instances of this offense.

Proof.—(a) That the accused was the commanding officer of a certain command in quarters, garrison, camp, or on the march, as alleged; (b) that a complaint was duly made to him by a certain person of damage to or loss of certain property occasioned by troops of the accused's command, as alleged; and (c) that the accused either refused to see reparation made, or omitted in the manner alleged to see reparation made, to the party injured in so far as the offender's pay would go toward such reparation.

148. NINETY-SECOND ARTICLE OF WAR.

a. MURDER

Discussion.—"In time of peace" contemplates a complete peace, officially proclaimed. (Kalm v. Anderson, 255 U. S. 1.)

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. The death must take place within a year and a day of the act or omission that caused it, and the offense is committed at the place of such act or omission although the victim may have died elsewhere.

Among the lesser offenses which may be included in a particular charge of murder are manslaughter, certain forms of assault, and an attempt to commit murder.

Without legal justification.—A homicide done in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a legal sentence of death; killing in suppressing a mutiny or in preventing the escape of a prisoner where no other possible means are adequate; killing an enemy in battle; and killing to pre-

vent the commission of a felony attempted by force or surprise, such as murder, burglary, or arson, are cases of justifiable homicide.

The general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal. (Wharton on Homicide.)

The foregoing principles should not be construed as conferring immunity on an officer or soldier who willfully or through culpable negligence does acts endangering the lives of innocent third parties in the discharge of his duty to prevent escape or effect an arrest.

Without legal excuse.—A homicide which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, is excusable. Thus, where a lawful operation, performed with due care and skill, causes the death of the patient, the homicide is excusable. To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor.

Malice aforethought.—Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily

harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. (See 140d—Burglary.) An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed. (Clark.)

Proof.—(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) that such killing was with malice aforethought.

In trials for murder and manslaughter.—The law recognizes an exception to the rule rejecting hearsay by allowing the dying declarations of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them. It is necessary, however, to the competency of testimony of this character—and it must be proved as preliminary to the proof of the declaration—that the person whose words are repeated by the witness should have been *in extremis* and under a sense of impending death, i. e., in the belief that he was to die soon; though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown. And if this belief on his part sufficiently appears, it is not essential to the admissibility of his words that death should have immediately followed upon them. On the other hand if, in uttering the words, he was under the impression that he should recover, the same would be inadmissible even if in fact he presently died. But it is no objection to their admissibility that they were brought out in answer to leading questions, or upon urgent solicitations addressed to him by any person or persons; and if, instead of speaking, he answered the questions by intelligible signs, these signs may equally be testified to. But it is held that only such declarations are admissible as would be admitted if the party were himself a witness; so that where the language employed is irrelevant or consists in a statement of opinion instead of fact, it can not be received. If it was put in writing at the time, the writing should be

produced. Dying declarations are admissible as well in favor of the accused as against him.

It is to be remarked that evidence of dying declarations is usually to be received with great caution, since such declarations are usually made under circumstances of mental and physical depreciation, and without being subjected to the ordinary legal tests. (Winthrop.)

b. RAPE

Discussion.—Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent.

It has been said of this offense that "it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

So-called statutory rape—that is, carnal knowledge with her consent of a female under the age of consent—is not an offense under this article, but may be an offense under A. W. 96.

Among the lesser offenses which may be included in that of rape, are assault with intent to commit rape, assault and battery, assault, and an attempt to commit rape.

Proof.—(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent.

149. NINETY-THIRD ARTICLE OF WAR.

a. MANSLAUGHTER

Discussion.—See 148a. Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor

likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark.)

The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.

In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark.)

The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. Instances of adequate provocation are: Assault and battery inflicting actual bodily harm, an unlawful imprisonment, and the sight by a husband of an act of adultery committed by his wife. If the person so assaulted or imprisoned, or the husband so situated at once kills the offender or offenders in a heat of a sudden passion caused by their acts, manslaughter only has been committed.

Instances of inadequate provocation are: Insulting or abusive words or gestures, trespass or other injuries to property, and breaches of contract.

In involuntary manslaughter in the commission of an unlawful act, the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by a statute or orders. Thus the driving of an automobile in slight excess of a speed limit duly fixed, but not recklessly, is not the kind of unlawful act contemplated, but voluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least.

Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged; carelessly leaving poisons or dangerous drugs where they may endanger life.

Where there is no legal duty to act there can, of course, be no neglect. Thus where a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed.

Among the lesser offenses which may be included in a particular charge of voluntary manslaughter are the various forms of assault and an attempt to commit manslaughter.

Proof.—(a) Item (a) under proof, 148*a*; and (b) the facts and circumstances of the case, as alleged, indicating that the homicide amounted in law to manslaughter.

As to dying declarations see 148*c* under proof.

b. MAYHEM

Discussion.—Mayhem is a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary. (Bishop.)

Thus it is mayhem to put out a man's eye, to cut off his hand, or his foot or finger, or even to knock out a front tooth, as these are members which he may use in fighting; but it is otherwise if either the ear or nose is cut off or a back tooth knocked off, as these injuries merely disfigure him. (Clark.)

To constitute mayhem the injury must be willfully and maliciously done, but need not be premeditated. If the hurt is done under circumstances which would excuse or justify homicide, no offense is committed. A person inflicting such a hurt upon himself is guilty of this offense; and if another does it at his request, both are so guilty.

Among the lesser offenses included in a particular charge of mayhem are assault with intent to commit mayhem, assault and battery, assault, and an attempt to commit mayhem.

Proof.—(a) That the accused inflicted on a certain person a certain injury in the manner alleged; and (b) the facts and circumstances of the act showing such injury to have been inflicted intentionally and maliciously.

c. ARSON

Discussion.—Arson is the willful and malicious burning of the dwelling house or outhouse of another. (Clark.) The offense is against the habitation of another rather than against his property. The term "dwelling house" includes outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not the subject of arson unless occupied as a dwelling. It is not arson to burn a house that has never been occupied or which has been permanently abandoned; but it is arson if the occupant is merely temporarily absent. It is not arson for a tenant to burn the dwelling in which he lives although it is the property of another, but the legal owner of a house which is in the rightful occupancy of another

may be guilty of arson in burning it. It is not arson to burn the dwelling of another at his request.

To constitute a burning some part, however small, of the house must be actually consumed or disintegrated by the heat, but a mere scorching is not a burning.

Proof.—(a) That the accused burned a certain dwelling house of another, as alleged; and (b) facts and circumstances indicating that the act was willful and malicious.

d. BURGLARY

Discussion.—Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. (Bishop.)

The term "felony" includes, among other offenses so designated at common law, murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (irrespective of value). It is immaterial whether the felony be committed or even attempted, and where a felony is actually intended it is no defense that its commission was impossible.

To constitute burglary the house must be a dwelling house of another, the term "dwelling house" including outhouses within the curtilage or the common inclosure. (Clark & Marshall.)

A store is not a subject of burglary unless part of, or used also as, a dwelling house, as where the occupant uses another part of the same building as his dwelling, or where the store is habitually slept in by his servants or members of his family.

The house must be in the status of being occupied at the time of the breaking and entering. It is not necessary to this status that anyone actually be in it; but if the house has never been occupied at all or has been left without any intention of returning to it this status does not exist. Separate dwellings within the same building, as a flat in an apartment house or a room in a hotel, are subjects of burglary by other tenants or guests, and in general by the owner of the building himself. A tent is not a subject of burglary.

There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not constitute a breaking; but where there is any removal of any part of the house designed to prevent entry, other than the moving of a partly open door or window, it is sufficient. Thus opening a closed door or window or other similar fixture, or cutting out the glass of a window or the netting of the screen is a sufficient breaking. So also the breaking of an inner door by one who has entered the house without breaking, or by a servant lawfully

within the house, but who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with intent to commit a felony therein burglary is not committed.

There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as personating a gas or telephone inspector, or by intimidating the inmates through violence or threats into opening the door; or through collusion with a confederate, an inmate of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument except merely to facilitate further entrance is a sufficient entry.

Both the breaking and entry must be in the nighttime, which is the period between sunset and sunrise, when there is not sufficient daylight to discern a man's face, and both must be done with the intent to commit a felony in the house. If the available evidence appears to warrant such action, the actual commission of the felony alleged as intended in the burglary specification should be charged in a separate specification.

Proof.—(a) That the accused broke and entered a certain dwelling house of a certain other person, as specified; (b) that such breaking and entering were done in the nighttime; and (c) the facts and circumstances of the case (for instance, the actual commission of the felony) which indicate that such breaking and entering were done with the intent to commit the alleged felony therein.

c. HOUSEBREAKING

Discussion.—Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein.

The offense is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that such place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit a felony. The intent to commit some criminal offense is an essential element of the offense, and must therefore be alleged and proved, in order to support a conviction of this offense.

The term "criminal offense" includes any act or omission violative of the Articles of War, which is cognizable by courts-martial, except acts or omissions constituting purely military offenses.

The principles of the last sentence of the discussion in 149d (Burglary) should be observed when charging housebreaking.

Proof.—(a) That the accused entered the place alleged and (b) the facts and circumstances of the case which indicate that the intent was as alleged.

1. ROBBERY

Discussion.—Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark.)

It is not robbery to take one's own property, unless the person from whom it is taken has a special property interest in the goods and the right to possession; nor is it robbery to take property under the honest belief that it is one's own. It is not necessary that the person from whom the property is taken be the actual owner—it is enough if he has a possession or a custody that is good against the taker.

The property must be taken from the person or in his presence; but to be in the presence it is not necessary that the owner be within any certain distance of his property. Thus where some persons entered a house and forced the owner by threats to disclose the hiding place of valuables in an adjoining room, and then, leaving the owner tied, went into such room and stole the valuables, their offense was held to be robbery.

The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking.

The violence must be actual violence to the person, but the amount used is immaterial. It is enough where it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. Where an article is merely snatched out of another's hand or a pocket is picked by stealth and no other force is used and the owner is not put in fear, the offense is not robbery. But if in snatching the article, resistance is overcome, there is sufficient violence, as where a woman's earring is torn from her ear or a hair ornament entangled in her hair is snatched away. So, also, there is sufficient violence where a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch; or where a man is knocked insensible and his pockets rifled; or where an officer steals property from the person of a prisoner in his charge after handcuffing him on the pretext of preventing his escape.

It is equally robbery where the robber by threats or menaces puts his victim in such fear that he is warranted in making no resistance.

The fear must be a reasonably well-founded apprehension of present or future danger, and the goods must be taken while such apprehension exists. The danger apprehended may be, for instance, his own death or some bodily injury to him, or the destruction of his habitation, or a prosecution for an unnatural crime, where a mere accusation, though false, would so injure a person that fear of it would naturally cause him to give up his property. (Cf. Clark.)

Robbery includes larceny, and the elements of that offense must always be present and should be alleged in the specification and proved at the trial. When the evidence falls short of proving the force or fear or other facts necessary to robbery but does prove larceny, the accused, by proper exceptions, may be found guilty of larceny.

Among the lesser offenses that may be included in a particular charge of robbery are also assault with intent to rob, larceny from the person, assault and battery, and assault.

Proof.—(a) The larceny of the property (see proof under 149g—Larceny); (b) that such larceny was from the person or in the presence of the person alleged to have been robbed; and (c) that the taking was by force and violence or putting in fear, as alleged.

g. LARCENY

Discussion.—Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark.)

Once a larceny is committed, a return of the property or payment for it is no defense to a charge of larceny. Personal property only is the subject of larceny.

Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

In cases of larceny of property (except property described in A. W. 94), where the accused has sold the stolen property, the charges should not include specifications alleging the sale except where the same has been made to an innocent party and constitutes such a fraud upon the purchaser as to warrant the preferment of a specification based upon such fraud.

Taking and carrying away.—In larceny there must be a taking and carrying away. The taking must be from the actual or constructive possession of the owner. The carrying away means any movement

by the thief of the property, however slight, from the precise place where it was at the time it was seized; except that possession by the thief must be complete. Thus, possession is not complete while the property is secured by a chain. The taking, however, need not be by the thief with his own hands. Thus, when one, having the required intent to steal, entices a horse into his own stable without touching him, or procures an insane person to take certain articles, or procures a railroad company to deliver to him another's trunk by changing the check on it, he is guilty of larceny. In these cases the act of taking is in law the act of the thief himself.

Trespass.—To constitute larceny the taking and carrying away must be by trespass; that is, it must be taken from the owner's possession without his consent. Though a person who appropriates another's property to his own use may have the intent necessary to larceny, yet, if there is no trespass in taking the property, there is no larceny. For example, the possession of the property may have been lawfully obtained by the person who appropriates it, in which case a trespass by him is impossible so long as he has such possession. Thus, where an article is borrowed or hired, the person borrowing or hiring it does not commit a larceny if he subsequently, while holding the property as a borrower, or hirer, decides to and does convert the article to his own use. In such a case there is no trespass and the offense is, in consequence, not larceny but embezzlement. It is larceny, however, if at the time the article is borrowed or hired the borrower or hirer has the intention to convert it. The distinction between "possession" and "custody" and the meaning of "property" must be kept in mind. Possession is the present right and power absolutely to control a thing, and not only includes those things of which one has actual manual grasp, but extends also to those things that are in his house, or on his land, or in the actual manual care and keeping of his servants or agents. Thus, where the owner of a coin gives it to another to examine on the spot, the owner still retains possession of the coin; and if the other goes away with the coin intending to steal it, he is guilty of larceny. One who receives property under such or similar circumstances is said to have the custody only of the property. Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the "custody" of property, as distinguished from the "possession," where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i. e., constructive possession as distinguished from actual possession) of the property. "Property" in a thing is the

right to possession, coupled ordinarily with an ability to exercise that right. (Clark.)

Where general ownership is in one person and possession in another, a special owner, borrower, or hirer, it is optional to charge the ownership as in the real owner or in the person in possession.

Intent.—In addition to the taking and carrying away of property by trespass, there must be an intent permanently to deprive the owner of his property therein, and ordinarily such intent must exist at the time of the taking. Unless such felonious or evil intent exist at the time of the taking and carrying away there is no larceny except as noted in this paragraph. For example, the act of riding off on another's horse without permission, with intent to ride a short distance and then to return it, is a trespass but not a larceny, because the intent to deprive the owner permanently of his property is not present. However, when the original taking was wrongful, a subsequent felonious or evil intent makes the offense larceny in all cases in which there is concurrently with such intent, although subsequent to the taking, a fraudulent conversion of the goods.

Proof.—(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value.

The existence of the intent must in most cases be inferred from circumstances. Thus, if a person secretly takes property, hides it, and denies that he knows anything about it, the intent to steal may well be inferred; but if he takes it openly, and returns it, this would tend to show an innocent purpose. Proof of a subsequent sale of stolen property goes to show intent to steal, and, therefore, evidence of such sale may be introduced to support charges of larceny.

Where the character of the property clearly appears in evidence, for instance, if it is exhibited in court, the court, from its own experience, may infer that the property has some value.

A. EMBEZZLEMENT

Discussion.—Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (*Moore v. U. S.*, 160 U. S. 268.)

The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and

the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship.

Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value. See the last sentence of A. W. 94 for certain cases of embezzlement chargeable under A. W. 93.

Proof.—(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent.

4. PERJURY

Discussion.—Perjury is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. (Clark.) "Judicial proceeding or course of justice" includes trials by courts-martial. (Wharton Crim. Law.)

The false testimony must be willfully and corruptly given; that is, with a deliberate intent to testify falsely.

A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing be true or false in fact. So, also, a witness may commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion on matters of fact. Thus, where a witness swears that he does not remember certain facts when in fact he does, he commits perjury, if the other elements of the offense are present. So, also, where a witness testifies that in his opinion a certain person was drunk when in fact he entertains the contrary opinion.

The oath must be one required or authorized by law and must be duly administered by one authorized to administer it. Where a form of oath has been prescribed a literal following of the statute is not essential. It is sufficient if the oath administered conforms in substance to the statutory form. An oath includes an affirmation where the latter is authorized in lieu of an oath.

It is no defense that the witness voluntarily appeared, or that he was incompetent as a witness, or that his testimony was given in response to questions that he could have declined to answer, even if he was forced to answer it, over his claim of privilege.

The false testimony must be material to the issue or matter of inquiry, but the issue or matter of inquiry may be a collateral one. Thus perjury may be committed by giving material false testimony with respect to the credibility of a material witness, or in an affidavit in support of a request for a continuance, as well as by giving testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue.

Proof.—(a) That a certain judicial proceeding or course of justice was pending; (b) that the accused took an oath or its equivalent in such proceeding, or course of justice, as alleged; (c) that such oath was administered to the accused in a matter where an oath was required or authorized by law, as alleged; (d) that such oath was administered by a person having authority to do so; (e) that upon such oath he gave the testimony alleged; (f) that such testimony was false, and material to the issue or matter of inquiry; and (g) the facts and circumstances indicating that such false testimony was willfully and corruptly given.

The testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown in evidence tending to prove the falsity. Documentary evidence is especially valuable in this connection; for example, where a person is charged with a perjury as to facts directly disproved by documentary or written testimony springing from himself with circumstances showing the corrupt intent; or where the testimony with respect to which perjury is charged is contradicted by a public record proved to have been well known to the accused when he took the oath.

J. FORGERY

Discussion.—Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice. (Clark.)

Some of the instruments that are subjects of forgery are checks, indorsements, orders for delivery of money or goods, railroad tickets, and receipts. A writing falsely made includes a false instrument that may be in part or entirely printed, engraved, written with a pencil, or made by photography or other device. A false writing may be made by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written.

The writing must be false—must purport to be what it is not. Thus, signing another's name to a check with intent to defraud is forgery as the instrument purports on its face to be what it is not.

But where, after the false signature of such person is added the word "by" with the signature of the person making the check thus indicating the authority to sign, the offense is not forgery, even if no such authority exists, as the check on its face is what it purports to be. Forgery may be committed by signing one's own name to an instrument; for example, where a check payable to the order of a certain person comes into the hands of another of the same name, he commits forgery when, knowing the check to be another's, he indorses it with his own name intending to defraud. Forgery may also be committed by signing a fictitious name, as where a person makes a check payable to himself as drawee and signs it with a fictitious name as drawer.

To constitute a forgery the instrument must on its face appear to be enforceable at law, for example, a check or note; or one which might operate to the prejudice of another, for example, a receipt. The fraudulent making of an instrument affirmatively invalid on its face is not a forgery. However, the fraudulent making of a signature on a check is forgery even if there be no resemblance to the genuine signature, and the name is misspelled.

Alterations in writings must be material. Examples of alterations are erasures of material matters; changing the date, amount, or place of payment of a note.

The false writing must be made or altered with intent to defraud or injure another. It is immaterial, however, that anyone be actually defrauded or injured, or that no further step be made toward carrying out the intent to defraud than the making of the false writing.

Passing or uttering as true and genuine a forged instrument, knowing it to be false, or attempting so to do, is not chargeable under this article.

Proof.—(a) That a certain writing was falsely made or altered as alleged; (b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that it was the accused who so falsely made or altered such paper; and (d) the facts and circumstances of the case indicating the intent of the accused thereby to defraud or prejudice the right of another person.

The instrument itself should be produced, if available. The falsity of a written instrument may be proved by calling as a witness the person whose signature was forged, and showing that he had not signed the document himself, and that he had not authorized the accused to do so for him. Where the name of a fictitious person is used, as for example, the purported signature of a fictitious person as drawer of a check, evidence of falsity may include evidence from the bank upon which such check is drawn, that the drawer of the check had no account in such bank.

1. SODOMY

Discussion.—Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals.

Proof.—That the accused had sexual connection with a certain brute animal or had sexual connection by rectum or by mouth with a certain human being, as alleged in the specification.

1. ASSAULT WITH INTENT TO COMMIT ANY FELONY

Discussion.—An assault with intent to commit any felony is an assault made with a specific intent to murder, rape, rob, or to commit manslaughter, sodomy, or other felony. See definition of felony in 149d (Burglary).

Assault.—An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall.) Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another, are examples of assault.

Some overt act is necessary in any assault. Mere preparation, such as unfastening the catch on a pistol holster in order that the pistol may be drawn, or picking up a stone at a considerable distance from another without making any attempt or offer to throw it, is not an assault.

The force or violence must be physical; mere words, however threatening, or insulting gestures are not in themselves sufficient to constitute an assault.

Furthermore, in an assault there must be an intent, actual or apparent, to inflict corporal hurt on another. Where the circumstances known to the person menaced clearly negative such intent, there is no assault. Thus, where a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of his intention not to strike, there is no assault. This principle was applied in a case where the defendant raised his whip and shook it at the complainant within striking distance saying, "If you weren't an old man, I would knock you down."

It is not a defense to a charge of assault that for some reason unknown to the assailant his attempt was bound to fail. Thus, where a soldier loads his rifle with what he believes to be a good cartridge and, pointing it at a person, pulls the trigger, he is guilty of assault although the cartridge was in fact so defective that it did not explode. The same principle was applied to a case where a person in

a house shoots through the roof at a place where he supposed a policeman was concealed, though the policeman was at another place on the roof.

If there be such a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person at whom it is directed reasonably to fear the injury unless he retreat to secure his safety, and under such circumstances he is compelled to retreat to avoid any impending danger, the assault is complete, though the assailant may never have been within actual striking distance of the person assailed. (Clark and Marshall.) There must, however, be an apparent present ability. To aim a pistol at a man at such a distance that it clearly could not injure would not be an assault.

A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately. Thus, it is a battery to spit on another; to push a third person against him; to set a dog at him which bites him; to cut his dress while he is wearing it, though without touching or intending to touch his person; to shoot him; or to cause him to take poison. So it is a battery for a man to fondle, against her will, a woman not his wife. The force may be applied through conductors more or less close. Thus, to strike the dress of the person assailed, or the horse on which he is riding, or the house in which he resides, may be as much a battery as to strike his face. It is not, however, a battery to lay hands on another to attract his attention, or to seize another to prevent a fall. Sending a missile into a crowd also is a battery on anyone whom the missile hits; and so is the use, on the part of one who is excused in using force, of more force than is required. If the injury is accidentally inflicted in doing a lawful act without culpable negligence, the offense is not committed; but where a personal injury results from the reckless doing of an act likely to result in such injury, the offense is committed.

Assault with intent to murder.—This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from being guilty of an assault with intent to commit murder where the means are ap-

parently adapted to the end in view. Thus, where a soldier intending to murder another loads his rifle with what he believed to be a ball cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, got hold of a blank cartridge.

A general felonious intent or specific design to commit another felony is not sufficient, and where a person is too drunk to entertain the specific intent the offense is not committed. But where the accused, intending to murder A, shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with the intent to murder him; so also where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group.

Assault with intent to commit manslaughter.—This offense differs from assault with intent to murder in the lack of the element of malice necessary to constitute the latter crime. It is an assault in an attempt to take human life in a sudden heat of passion. The specific intent to kill is necessary, and the act must be done under such circumstances that, had death ensued, the offense would have been voluntary manslaughter. There can be no assault with intent to commit involuntary manslaughter.

Assault with intent to commit rape.—This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. Indecent advances, importunities however earnest; mere threats; and actual attempts to rape wherein the overt act is not an assault do not amount to this offense. Thus, where a man, intending to rape a woman, stealthily concealed himself in her room to await a favorable opportunity to execute his design but was discovered and fled, he was not guilty of an assault with intent to commit rape.

No actual touching is necessary. Thus, when a man entered a woman's room and got in the bed where she was and within reach of her person for the purpose of raping her he committed the offense under discussion, although he did not touch the woman.

The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Assault with intent to rob.—This is an attempt to commit robbery wherein the overt act is an assault and the concurrent intent is forcibly to take, steal, and carry away property of the person assaulted from his person or in his presence by violence or putting him in fear.

The fact that the accused intended to take only money and that the person he attempted to rob had none is not a defense.

Assault with intent to commit sodomy.—The assault must be against a human being, and must be with the specific intent to commit sodomy. Any less intent, or different intent, will not suffice.

Proof.—(a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to murder, or to commit manslaughter, rape, robbery, or sodomy as alleged.

m. ASSAULT WITH INTENT TO DO BODILY HARM WITH A DANGEROUS WEAPON, INSTRUMENT, OR OTHER THING

Discussion.—Weapons, etc., are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm. The mere fact that a weapon is susceptible of being so used is not enough. Boiling water may be so used as to be a dangerous thing, and a pistol may be so used as not to be a dangerous weapon.

Proof.—(a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm.

n. ASSAULT WITH INTENT TO DO BODILY HARM

Discussion.—This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured.

Proof.—(a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person.

150. NINETY-FOURTH ARTICLE OF WAR.

a. MAKING OR CAUSING TO BE MADE A FALSE OR FRAUDULENT CLAIM

Discussion.—Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The article does not relate to claims against an officer of the United States in his private capacity, but to claims against the United States or any officer thereof as such. It is not necessary that the claim be

allowed or paid or that it be made by the person to be benefited by the allowance or payment. The claim must be made or caused to be made with knowledge of its fictitious or dishonest character. This does not include claims, however groundless they may be, that are honestly believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence, but it does include claims made by a person who has the belief of the false character of the claim that the ordinarily prudent man would have entertained under the circumstances. See also the discussion in 150b.

An instance of making a false claim would be where an officer having a claim respecting property lost in the military service knowingly includes articles that were not in fact lost and submits such claim to his commanding officer for the action of the board.

Proof.—(a) That the accused made or caused to be made a certain claim against the United States, as alleged; (b) that such claim was false or fraudulent in the particulars specified; (c) that when the accused made the claim or caused it to be made he knew that it was false or fraudulent in such particulars; and (d) the amount involved, as alleged.

6. PRESENTING OR CAUSING TO BE PRESENTED FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM

Discussion.—See discussion in 150n.

The claim must be presented, directly or indirectly, to some person having authority to approve or pay it. False and fraudulent claims include not only those containing some material false statement, but also claims that the person presenting knows to have been paid or for some other reason knows he is not authorized to present or to receive money on.

Where an officer knows that a certain duly assigned pay account of his is outstanding and that the assignee can collect on it if he chooses to do so, it is no defense to a charge against such officer of presenting for payment a second account covering the same period as the assigned account that the second account was presented relying on the assignee's statement that he would not present the first. But where the accused has good grounds to believe and actually does believe when he presents the second account that the assigned account had been canceled or surrendered by the assignee, his presentation of the second claim does not constitute this offense. A cancellation or surrender of the first account after the presentation of the second account is, of course, no defense to the charge.

Presenting to a paymaster a false final statement, knowing it to be false, is an example of the offense under discussion.

Proof.—(a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved, as alleged.

c. ENTERING INTO AN AGREEMENT OR CONSPIRACY TO DEFRAUD THE UNITED STATES THROUGH FALSE CLAIMS

Discussion.—A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end. (Bishop.) The mere entry into a corrupt agreement for the purpose of defrauding the United States through any of the means specified constitutes the offense. An example of this offense is an agreement between a contractor and an officer to defraud the United States by means of a padded voucher to be certified as correct by the officer.

Proof.—(a) That the accused and one or more other persons named or described entered into an agreement; (b) that the object of the agreement was to defraud the United States; (c) that the means by which the fraud was to be effected were to obtain or assist certain other persons to obtain the allowance or payment of a certain false or fraudulent claim, as specified; and (d) the amount involved, as alleged.

d. MAKING, USING, PROCURING, OR ADVISING THE MAKING OR USE OF A FALSE WRITING OR OTHER PAPER IN CONNECTION WITH CLAIMS

Discussion.—See 150a and b.

It is not necessary to the offense of making a writing knowing it to contain false or fraudulent statements that such writing be used or attempted to be used, or that the claim in support of which it was made be presented for approval, allowance, or payment. The false or fraudulent statement should, however, be material.

In the offense of procuring the making or use of the writing or other paper, the paper must be made or used; but in the offense of advising such acts the making or use of the paper is not necessary.

Proof.—(a) That the accused made or used or procured or advised the making or use of a certain writing or other paper, as alleged; (b) that certain statements in such writing or other papers were false or fraudulent, as alleged; (c) that the accused knew this; (d) the facts and circumstances indicating that the act of the ac-

cused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified, and (e) the amount involved, as alleged.

c. FALSE OATH IN CONNECTION WITH CLAIMS

Discussion.—See 150a, b, and d.

Proof.—(a) That the accused made or procured or advised the making of an oath to a certain fact or to a certain writing or other paper, as alleged; (b) that such oath was false, as alleged; (c) that the accused knew it was false; (d) the facts and circumstances of the case indicating that the act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

f. FORGERY, ETC., OF SIGNATURE IN CONNECTION WITH CLAIMS

Discussion.—See 150a and b.

The term “forges or counterfeits” includes any fraudulent making of another’s signature, whether an attempt is made to imitate the handwriting or not.

Proof.—(a) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper or that he procured or advised the act as specified; or that he used the forged or counterfeited signature of a certain person or procured or advised its use, knowing such signature to be forged or counterfeited, as alleged; and (b) the facts and circumstances of the case indicating that his act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

g. DELIVERING LESS THAN AMOUNT CALLED FOR BY RECEIPT

Discussion.—It is immaterial in this offense by what means, whether by deceit, collusion, or otherwise, the accused effected the transaction, or what his purpose was in so doing.

Instances of this offense are:

A contractor gave a receipt for a greater amount than was due him from the United States. Thereupon the disbursing officer gave him the full amount called for by the receipt, but received back from the contractor the excess over the amount actually due.

A disbursing officer, having delivered to a creditor of the United States less money than was actually due, received a receipt signed in blank by the creditor, which he afterwards completed by writing the true amount due.

Proof.—(a) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the military service thereof, as alleged; (b) that he obtained a receipt for a certain amount or quantity of such money or property, as alleged; (c) that for such receipt he knowingly delivered, or caused to be delivered, to a certain person having authority to receive it an amount or quantity of such money or property less than the amount or quantity thereof specified in such receipt; and (d) the value of the undelivered money or property, as alleged.

A. MAKING OR DELIVERING RECEIPT WITHOUT HAVING FULL KNOWLEDGE THAT THE SAME IS TRUE

Discussion.—Where, for instance, an officer, or other person subject to military law, is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, and a receipt or other paper is presented to him for signature, stating that a certain amount of supplies has been furnished by a certain contractor, it is his duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If, with intent to defraud the United States, he signs the paper without such knowledge, he is guilty of a violation of this clause of the article; and signing the paper without such knowledge is *prima facie* evidence of such intent.

Proof.—(a) That the accused was authorized to make or deliver a certificate of the receipt from a certain person of certain property of the United States furnished or intended for the military service thereof, as alleged; (b) that he made or delivered to such person such certificate, as alleged; (c) that such certificate was made or delivered without the accused having full knowledge of the truth of a certain material statement or statements therein; (d) the facts and circumstances indicating that his act was done with intent to defraud the United States; and (e) the amount involved, as alleged.

I. STEALING, EMBEZZLEMENT, MISAPPROPRIATION, SALE, ETC., OF MILITARY PROPERTY OR MONEY

Discussion.—As to larceny and embezzlement, see 149*g* and *h*. Larceny and sale of the same property in violation of this article should be charged in separate specifications, since both offenses are denounced therein.

Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. The misappropriation of the property or money need not

be for the benefit of the accused; the words "to his own use or benefit" qualify the word "applies" only.

Larceny, embezzlement, etc., must be of the particular kind of property mentioned in the article. Post-exchange and company funds and money appropriated for other than the military service do not come within the description "money of the United States furnished or intended for the military service thereof."

Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended.

Proof.—Larceny and embezzlement.—(a) (See 149g and h—Proof); and (b) that the property belonged to the United States and that it was furnished, or intended for the military service thereof, as alleged.

Misappropriation and misapplication.—(a) That the accused misappropriated or applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done; and (d) the value of the property, as specified.

Sale or wrongful disposition.—(a) That the accused sold or disposed of certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof; (c) the facts and circumstances of the case indicating that the act of the accused was wrongfully or knowingly done, as alleged; and (d) the value of the property, as alleged.

1. PURCHASING OR RECEIVING IN PLEDGE OF MILITARY PROPERTY

Discussion.—To constitute this offense the accused must know not only that the person selling or pledging the property was in one of the specified classes and that the property was the property of the United States, but also that the person so selling or pledging it had no lawful right so to do.

Proof.—(a) That the accused purchased, or received in pledge, for a certain obligation or indebtedness certain military property of the United States, as alleged, knowing it to be such property; (b)

that such property was purchased or so received in pledge from a certain soldier, officer, or other person who was a part of or employed in the military service of the United States, as alleged, and that the accused knew the person selling or pledging the property to be such soldier, officer, or other person; (c) that such soldier, officer, or other person had not the lawful right to sell or pledge such property; (d) that the accused knew, at the time, of such lack of lawful right in such soldier, officer, or other person, so to sell or pledge such property; and (e) the value of the property, as alleged.

151. NINETY-FIFTH ARTICLE OF WAR.

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN

Discussion.—The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms. (Winthrop.)

There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness.

This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding article.

Instances of violation of this article are:

Knowingly making a false official statement; dishonorable neglect to pay debts; opening and reading another's letters without authority; giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be; using insulting or defamatory language to another officer in his presence, or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public associa-

tion with notorious prostitutes; cruel treatment of soldiers; committing or attempting to commit a crime involving moral turpitude; failing without a good cause to support his family.

Proof.—(a) That the accused did or omitted to do the acts, as alleged; and (b) the circumstances, intent, motive, etc., as specified.

152. NINETY-SIXTH ARTICLE OF WAR.

A. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE

Discussion.—The disorders and neglects include all acts or omissions to the prejudice of good order and military discipline not made punishable by any of the preceding articles.

By the term "to the prejudice," etc., is to be understood directly prejudicial, not indirectly or remotely, merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline; but it is hardly to be supposed that the article contemplated such distant effects, and the same is, therefore, confined to cases in which the prejudice is reasonably direct and palpable. (Winthrop.)

Instances of such disorders and neglects in the case of officers are: Disobedience of standing orders or of the orders of an officer when the offense is not chargeable under a specific article; allowing a soldier to go on duty knowing him to be drunk; rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness.

Instances of such disorders and neglects in the cases of enlisted men are: Failing to appear on duty with a proper uniform; appearing with dirty clothing; malingering; abusing public animals; careless discharge of firearms; personating an officer; making false statements to an officer in regard to matters of duty.

Among the disorders herein made punishable is the fraudulent enlistment contemplated by A. W. 28, which differs from fraudulent enlistment under A. W. 54 in that the element of the receipt of pay or allowances is not present. The fact that at the time of the alleged fraudulent enlistment the accused was serving in a prior enlistment from which he had not been discharged may be proved, *prima facie*, by introducing authenticated records of a former unexpired enlistment. If the period of the prior enlistment has elapsed, the fact that there was no discharge from his former enlistment may be proved, *prima facie*, by the certificate of The Adjutant General or one of his assistants that the files and records of the office of The Adjutant General contain no record of the discharge of the accused from such enlistment.

For proof of fraudulent enlistment under A. W. 54, see 129 (Proof).

Proof.—(a) That the accused did or failed to do the acts specified; and (b) the circumstances, etc., as specified.

b. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE MILITARY SERVICE

Discussion.—"Discredit" as here used means "to injure the reputation of." Instances of such conduct on the part of persons subject to military law may include acts in violation of local law committed under such circumstances as to bring discredit upon the military service. So also is punishable under this clause any discreditable conduct not elsewhere made punishable by any specific Article of War or by one of the other clauses of A. W. 96.

If an officer or soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor thereafter reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct. He should not be brought to trial unless, in the opinion of the military authorities, the facts and law are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by the officer or soldier. The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims, that is, where there appears to be a genuine dispute as to the facts or the law. An officer may be tried for this offense under either A. W. 95 or A. W. 96, as the circumstances may warrant.

One object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made punishable by the Articles of War but which are of a nature to bring discredit on the service, such as failure to pay debts.

Proof.—(a) That the accused did or failed to do the acts alleged; and (b) the circumstances, etc., as specified.

c. CRIMES OR OFFENSES NOT CAPITAL

Discussion.—The crimes referred to in this article embrace those crimes, not capital and not made punishable by another Article of War, which are committed in violation of public law as enforced by the civil power. The "public law" here in contemplation includes that enacted by Congress or under the authority of Congress. For example, it includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United States. A per-

son subject to military law cannot, however, be prosecuted under this clause of the article for an act done in a State, Territory, or possession which is not a crime in that jurisdiction, merely because the same act would have exposed him to a criminal prosecution in a civil court of the District of Columbia had he done the act within the jurisdiction of such court. But such act, of course, might in a proper case be made the basis of a prosecution under one of the other clauses of this article as being a disorder, a neglect, or conduct of a nature to bring discredit upon the military service.

Among the crimes referred to in this article may be those offenses created by statute and given names therein which names are also found in other Articles of War given to offenses which have essentially different elements. For example, in sec. 117 of the Servicemen's Dependents Allowance Act of June 23, 1942 (56 Stat. 385), a false statement is declared to be perjury under certain circumstances although not made under oath. This perjury, however, is not the perjury denounced by A. W. 93. Therefore, the perjury defined by the act is chargeable under A. W. 96.

So also section 90 of the Federal Penal Code of 1910 provides that a failure by an officer to render accounts for public money received by him unless authorized to retain it as salary, pay, or emolument is an embezzlement of such funds. Such an embezzlement, not being within the general definition of embezzlement as the term is used in A. W. 93 and A. W. 94, would be chargeable under the general article.

The elements of some of the more common crimes that are chargeable as crimes under this article if "committed in violation of public law as enforced by the civil power" will now be discussed.

ASSAULT

See 149l (Assault).

ASSAULT AND BATTERY

See 149l (Assault).

UTTERING A FORGED INSTRUMENT

Discussion.—See 149j (Forgery). To constitute this offense there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud. The intent to defraud may be implied where knowledge of the falsity of the document is shown. It is not necessary that the instrument actually be passed. A mere offer coupled with a representation that it is good is a sufficient uttering.

Proof.—(a) That, as alleged in the specification, a certain paper was falsely made or falsely altered; (b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that the accused, as alleged in the specification, uttered such paper as true and genuine; (d) that the accused, when so doing, knew said paper to have been falsely made or falsely altered, as alleged in the specification; and (e) the facts and circumstances indicating the intent of the accused to defraud or prejudice the right of another.

The instrument itself should be produced if available.

ATTEMPTS

Discussion.—An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark.)

An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt. For example, a purchase of matches with intent to burn a haystack is not an attempt. But it is an attempt where the haystack is actually set on fire, even though it may be immediately put out by rain, blown out by the wind, or otherwise extinguished, with only immaterial damage to the hay. It is not an attempt where if every act intended by accused were completed there would legally be no crime, even though the accused may at the time believe he is committing such crime. Thus, to shoot at a log believing it to be a man would not be an attempt to murder.

Soliciting another to commit a crime is not an attempt! nor is mere preparation to do a criminal act.

If an attempt is included in the offense charged it may be found as a lesser included offense in violation of A. W. 96. However, if such attempt is denounced by some specific article it should be found under that article.

See in connection with attempts 78b (Findings as to the charges).

Proof.—(a) That the accused committed an overt act which if not interrupted by circumstances independent of the doer's will would have resulted in the commission of the offense, as alleged; (b) that the accused intended to commit that particular offense (this may usually be shown by the facts and circumstances surrounding the act); and (c) the apparent possibility of committing the offense in the manner indicated.

**BURNING BUILDINGS, VESSELS, LUMBER, STORES, ARMS,
AMMUNITION, ETC.**

Discussion.—Sections 285 and 286, Federal Penal Code, 1910, provide:

Sec. 285. Whoever shall willfully and maliciously set fire to, burn, or attempt to burn, or by means of a dangerous explosive destroy, or attempt to destroy, any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house, shall be imprisoned not more than twenty years.

Sec. 286. Whoever shall maliciously set fire to, burn, or attempt to burn, or by any means destroy or injure, or attempt to destroy or injure, any arsenal, armory, magazine, ropewalk, shiphouse, warehouse, blockhouse, or barrack, or any storehouse, barn, or stable not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel built, building, or undergoing repair, or any lighthouse, or beacon, or any machinery, timber, cables, rigging, or other materials or appliances for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be fined not more than five thousand dollars and imprisoned not more than twenty years.

These sections cover arson (see 149c) and also acts which are not arson; and include, for instance, any burning or destruction or injury, or attempt to burn, destroy, or injure any structure, machinery, appliances, equipment, or stores, or arms, or ammunition of any kind whatever, where the burning, etc., is done in a place where these sections are in force.

Proof.—(a) That the accused committed one of the acts denounced by sections 285 and 286, Federal Penal Code, as alleged; and (b) the facts and circumstances indicating that the act was willful and malicious.

FALSE SWEARING

Discussion.—Depending on the circumstances and place of commission, false swearing may be punishable as a crime under the third clause of A. W. 96, or as conduct to the prejudice, etc., under the first clause, or as conduct of a discreditable nature under the second clause. It may consist, for example, in giving false testimony in a judicial proceeding or course of justice on other than material matters or in making a false oath to an affidavit. It is not necessary that the proceeding in which the oath is taken should be a judicial proceeding. The oath may be taken before any person authorized by law to administer oaths; and a court-martial will take judicial notice of the qualifications of such persons to administer oaths.

Proof.—(a) That accused was sworn in a proceeding or made an oath to an affidavit; (b) that such oath was administered by a person having authority to do so; (c) that the testimony given or the matter in the affidavit was false, as alleged; and (d) the facts and circumstances indicating that such false testimony or affidavit was willfully and corruptly given or made.

CHAPTER XXVII

HABEAS CORPUS

GENERAL—RETURN TO WRIT ISSUED BY A STATE COURT OR JUDGE—RETURN TO WRIT ISSUED BY FEDERAL COURT OR JUDGE—FORMS—BRIEF

153. HABEAS CORPUS—General.—The purpose of the writ of habeas corpus is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is illegally restrained of his liberty. It is a summary remedy for unlawful restraint of liberty and it can not be made use of to perform the function of a writ of error or an appeal. Where it is decided that the restraint is unlawful he is ordered released, but if the restraint is lawful the writ is dismissed. If the restraint be by virtue of legal process, the validity and present force of such process are the only subjects of investigation.

A State court is without authority to inquire into the legality of the restraint where it appears that the custody is by virtue "of the authority of the United States," the principle being that no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus, within the jurisdiction of another and independent government. No State judge or court, after he or it is judicially informed that the party is held under the authority of the United States, has any right to interfere with him or to require him to be brought before them. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release. A deserter apprehended by a civil officer authorized by a statute of the United States to apprehend deserters is in the custody of the United States. See 157 (Brief in habeas corpus case).

154. HABEAS CORPUS—Return to Writ Issued by a State Court or Judge.—In the case of a person who has been apprehended under a warrant of attachment (see 976, Warrant of attachment), the officer on whom the writ was served will not produce the body but will make a return as indicated in 156 (Form B). In other cases, such as the case of an enlisted man or a general prisoner, the officer on whom the writ is served will not produce the body, but will make a return as indicated in 156 (Form D). A brief of authorities (157) is not intended to be attached to such a return. "

155. HABEAS CORPUS—Return to Writ Issued by Federal Court or Judge.—The officer upon whom such writ is served will at once report the fact of such service by telegraph direct to The Judge Advocate General of the Army and the commanding general of the corps area (service command) or department, stating briefly the grounds on which the release of the party is sought. The person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued and a return made setting forth the reasons for his restraint. See 156 (Forms A and C) and 157 (Brief).

With reference to the papers to accompany the return in a case to which Form A applies, see 97b (Warrant of attachment). In a case to which Form C applies, the copies of the charges and of the order under which the accused is held in arrest or confinement will be certified by the adjutant and sworn to before an officer authorized to administer oaths for military administration, in the following form:

I hereby certify that the foregoing is a full and true copy of the original charges preferred against _____, and of the original order for his arrest [or "confinement," as the case may be], and that the same are in the usual form of military charges, and that such charges and order conform to the rules regulating military procedure.

_____, Adjutant.

Sworn to and subscribed before me this _____ day of _____, 19____

Trial Judge Advocate of Court-Martial
[Or "Summary Court-Martial."]

The copy of the order convening the court or publishing the sentence will be certified and verified in a similar manner.

Should the court order the discharge of the party, the officer making the return, or counsel, should note an appeal pending instructions from the War Department, and he will report to the Adjutant General of the Army the action taken by the court and forward a copy of the opinion of the court as soon as it can be obtained.

The laws of the Philippine Islands (acts 272 and 421) provide in effect that in certain cases the certificate of the commanding general or of any general officer in command of the department or district as to the facts shall be a conclusive answer to a writ of habeas corpus against a military officer or soldier and is a sufficient excuse for not producing the prisoner. In any such case the body of the prisoner will not be produced, but the return will be made. In other cases in the Philippine Islands the return will be made and the body produced before the proper tribunal.

156. HABEAS CORPUS—Forms.—The return in a particular case should, of course, vary from the form according to the facts. Thus, if the person whose release is sought (Form C) is an officer or a warrant officer, proper changes should be made.

FORM A

(Return to writ)

In re ——— (name of party held).

(Writ of habeas corpus—Return of respondent)

To the ——— (court or judge):

The respondent, Maj. ———, United States Infantry, upon whom has been served a writ of habeas corpus for the production of ———, respectfully makes return and states that he holds the said ——— by authority of the United States, pursuant to a warrant of attachment issued under Chapter II, act of June 4, 1920, 22d Article of War, by a trial judge advocate of a lawfully convened general [or "special"] court-martial [or "by a summary court-martial"] and duly directed to him, the said respondent, for execution; that he is diligently and in good faith engaged in executing said warrant of attachment, and that he respectfully submits the same for the inspection of the court, together with the original subpoena and proof of service of the same, a copy of the order appointing the court-martial sworn to as such, before which the said ——— has been subpoenaed to testify, a copy of the charges and specifications in the case, sworn to as such, in which said ——— is a witness, a copy of the order referring the case to the court for trial, sworn to as such, and an affidavit of ——— showing that said ——— is a material witness in the case, that he has failed to appear and has offered no valid excuse for such failure.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said ———, and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

Major, ——— United States Infantry.

Dated ———, ———, 19—.

FORM B

(Return to writ)

(Make return as in Form A, except substitute for last paragraph the following:)

And said respondent further makes return that he has not produced the body of the said ———, because he holds him by authority of the United States as above set forth, and that this court [or "your honor," as the case may be] is without jurisdiction in the premises, and he respectfully refers to the decisions of the Supreme Court of the United States in *Ableman v. Booth* (21 How 506) and *Tarble's case* (13 Wall 397) as authority for his action, and prays this court [or "your honor"] to dismiss the writ.

Major, ——— United States Infantry.

Dated ———, ———, 19—.

FORM C

(Return to writ)

In re ——— (name of party held).

(Writ of habeas corpus—Return of respondent)

To the ——— (court or judge):

The respondent, Maj. ———, United States Infantry, upon whom has been served a writ of habeas corpus for the production of ———, respectfully makes return and states that he holds the said ——— by authority of the United States as a soldier in the United States Army [or "as a general prisoner under sentence of general court-martial"] under the following circumstances:

That the said ——— was duly enlisted as a soldier in the service of the United States at ———, on ———, 19—, for a term of ——— years. (If the offense is fraudulent enlistment, this recital should be omitted.)

(Here state the offense. If it is fraudulent enlistment by representing himself to be of the required age, it may be stated as follows:)

That on the ——— day of ———, 19—, at ———, the said ———, being under 18 years of age, did fraudulently enlist in the military service of the United States for the term of ——— years, by falsely representing himself to be over 18 years of age, to wit, ——— years and ——— months; and has, since said enlistment, received pay and allowances (or either) thereunder.

(If the offense be desertion, it may be stated substantially as follows:)

That the said ——— deserted said service at ———, on ———, 19—, and remained absent in desertion until he was apprehended at ———, on ———, 19—, by ———, and was thereupon committed to the custody of the respondent as commanding officer of the post of ———.

The said ——— has been placed in confinement [or "arrest" as the case may be], and formal charges have been preferred against him for said offense, a copy of which charges, and of the order under which said ——— is held in confinement [or "arrest," as the case may be], duly certified and verified, are hereto annexed, and that he will be brought to trial thereon as soon as practicable before a court-martial, to be convened by the commanding general of the ——— Department [or "convened by Special Orders, No. —, dated Headquarters ——— Department 19—, a copy of which duly certified and verified, is hereto annexed"].

(If the party held is a general prisoner, the following paragraph should be substituted for the preceding paragraph:)

That the said ——— was duly arraigned for said offense before a general court-martial, convened by Special Orders, No. —, dated Headquarters ——— Department, 19—, was convicted thereof by said court, and was sentenced to be ———, which sentence was duly approved on the ——— day of ———, 19—, by the officer ordering the court [or "by the officer commanding said ——— Department for the time being"] as required by the ——— Article of War. A copy of the order promulgating said sentence, duly certified and verified, is hereto attached.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said ———, respect-

fully refers to the decisions cited in the annexed brief [if the case does not involve a minor under the required age the words "respectfully refers to the decisions cited in the annexed brief" will be omitted], and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

Major, ——— United States Infantry.

Dated ———, ———, 19—.

FORM D

(Return to writ)

(Make return as in Form C, except as to last paragraph, for which substitute the paragraph set out in Form B.)

157. HABEAS CORPUS—Brief.—The following brief will be filed with a return to a writ of habeas corpus issued by a United States court in the case of a soldier whose discharge is sought on the ground of minority:

BRIEF

The right to avoid the contract of enlistment of a soldier on the ground of minority will be considered under the following heads: I. Under the common law; II. Under the statutes; III. Where the minor is held for punishment.

I. UNDER THE COMMON LAW

The enlistment of a minor is not avoidable by the minor nor by his parent or guardian at common law, but is only avoidable where the right to avoid it is conferred by statute.

This proposition is clearly established by the decision of the Supreme Court (*In re Morrissey*, 137 U. S. 157, 159), where the court said:

An enlistment is not a contract only, but effects a change of status. (*Grimley's case*, 137 U. S., 147.) It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians.

The court cites, in support of these statements, *Rea v. Rotherfield Greys* (1 Barn. & Cress, 345, 350; 8 Eng. C. L., 149), *Rea v. Lytchet Matraverse* (7 Barn. & Cress., 226, 231; 14 Eng. C. L., 107); *Commonwealth v. Gamble* (11 Serg. & Rawle (Pa. R.), 93); *U. S. v. Blakeney* (3 Grattan, 387, 405).

In *Rea v. Rotherfield Greys*, *supra*, it was said by Best, J.:

By the general policy of the law of England the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted it becomes inconsistent with the duty which he owes to the public that the parental authority should continue. The parental authority, however, is suspended, but not destroyed. When the reason for its suspension ceases the parental authority returns.

In *Rea v. Lytchet Matraverse, supra*, Bayley, J., after quoting these views of Best, J., says:

Lawrence, J., in *Rea v. Roach* (8 T. R., 254), seems to take the same view of the subject and to consider the authority of the State paramount to that of the parent so long as the minor continues in the public service, but as soon as he leaves it then the parental authority is restored.

It is clear from these authorities and others which could be cited that at common law the enlistment of a minor of *sufficient capacity to bear arms* was valid regardless of age. The right of the State to the services of such minors is forcefully laid down in *Lanahan v. Birge* (30 Conn., 438). See also *Cooley's Constitutional Law*, page 99, where on the authority of *Ex parte Brown* (5 Cranch, C. C., 554; Fed. Cas., No. 1972), and *United States v. Bainbridge* (1 Mason, 71; Fed. Cas., No. 14497), it is said:

Minors may be enlisted without the consent of their parents or guardians when the law fails to require such consent.

II. UNDER THE STATUTES

The pertinent statutes are the following:

SEC. 1116, R. S. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisting.

This section was modified by the act of March 2, 1899 (30 Stat. 978), which provides:

That the limits of age for original enlistments in the Army shall be eighteen and thirty-five years.

SEC. 1117, R. S. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.

This section was replaced by the provision of section 27, national defense act of June 3, 1916 (39 Stat. 186), which reenacted it in the same words, substituting the age of 18 years for the age of 21.

SEC. 1118, R. S. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service.

This proviso was not changed by the Army reorganization act of June 4, 1920, which struck out of section 27 of the national defense act (see 41 Stat. 775) only the first part of the section, up to and including the third proviso, but did not affect the proviso (fifth proviso) here in question.

1. The statutes confer no right upon the minor to avoid his enlistment, certainly not if he be 16 years of age or over.

Section 1116, R. S., as amended, prescribing the age limits of original enlistment, was made for the benefit of the Government, and not the minor. (*In re Morrissey*, 137 U. S., 167; *In re Grimley*, 137 U. S. 147; *In re Wall*, 8 Fed. Rep. 85; *In re Davidson*, 21 Fed. Rep. 618; *In re Zimmerman*, 30 Fed. Rep. 176; *In re Spencer*, 40 Fed. Rep. 149; *In re Lawler*, 40 Fed. Rep. 233; *Solomon v. Devonport*, 37 Fed. Rep. 318; *Wagner v. Gibbon*, 24 Fed. Rep. 135.)

Section 1117, R. S., as amended, while recognizing the right of the parent to the services of the minor confers no right in the minor to avoid his enlistment. See the cases cited above.

In the *Morrissey case* the Supreme Court of the United States said that the provision of section 1116, R. S.—

is for the benefit of the parent or guardian * * * but it gives no privilege to the minor * * * an enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant * * *. The contract of enlistment was good, so far as the petitioner is concerned. He was not only *de facto* but *de jure* a soldier—amenable to military jurisdiction.

Whether the designation of the age limit of 16 years in section 1118, R. S., is such as to make the enlistment of the minor under 16 years of age void or voidable by the minor has not been decided by the Supreme Court. In *Hoskins v. Pell* (239 Fed. Rep. 279), the court held that such an enlistment was void, but that decision is believed not to be sustained by the weight of authority. On principle, the minor, if of sufficient capacity to render military service, should not be permitted to avoid his enlistment obtained through his fraudulent statements as to his age. However this may be, if the minor continued to serve and receive pay, after passing that age, he acquires the status of a soldier like one who was enlisted when over 16 years without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence he can not be discharged on habeas corpus on petition of himself or his parents. (*Ex parte Hubbard*, 182 Fed. Rep. 76.)

2. The statutes requiring the consent of the parent or guardian of a minor to his enlistment (sec. 1117, R. S., amended by sec. 27, act of June 3, 1916) impliedly confer upon the parent or guardian the right to avoid an enlistment entered into by a minor under the prescribed age without the required consent, where the minor is not held for trial or punishment for a military offense.

In support of this proposition see the cases cited under II, proposition 1.

3. A parent or guardian with knowledge of the enlistment of a minor under the prescribed age, and acquiescing therein for a considerable period, may be held to be estopped from asserting the right to avoid the enlistment.

In support of this proposition see *Ex parte Dunakin* (202 Fed. Rep. 290), where it was held, quoting from the syllabi:

Where a minor enlisted without the consent of his parent or guardian, and his mother, who was his surviving parent, on learning of his enlistment shortly thereafter, did nothing to repudiate the same or to secure his release, and testified that she would have been reconciled to it had he remained in the Army

and not deserted, but that after his desertion she wanted to keep him out of the Army, her acts constituted an implied consent to his enlistment.

4. A minor fraudulently enlisting and remaining in the service after attaining the legal age of enlistment, or the age beyond which parental consent is not required, thereby validates his enlistment.

In support of this proposition see the case of *Ex parte Hubbard* (182 Fed. Rep. 76), where the court held, quoting the syllabus:

A minor enlisted in the Army when under the age of 16, who has continued to serve and receive pay after passing that age, acquires the status of a soldier like one who was enlisted when over 16 without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence he can not be discharged on habeas corpus on petition of himself or his parents.

III. WHERE THE MINOR IS HELD FOR PUNISHMENT

Neither the minor nor his parent nor guardian may avoid the enlistment where the soldier is held for trial or under sentence for a military offense.

In support of this proposition see the cases cited above under II, proposition 1, and also the following. *In re Kaufman* (41 Fed. Rep. 876); *In re Dohrendorf* (40 Fed. Rep. 148); *In re Cosenow* (37 Fed. Rep. 668); *In re Dowd* (90 Fed. Rep. 718); *In re Miller* (114 Fed. Rep. 838); *United States v. Reaves* (126 Fed. Rep. 127); *In re Lessard* (134 Fed. Rep. 305); *Ex parte Anderson* (16 Iowa 595); *McConologue's case* (107 Mass. 154, 170); *In re Carver* (142 Fed. Rep. 623); *In re Scott* (144 Fed. Rep. 79); *Dillingham v. Booker* (163 Fed. Rep. 696); *Ex parte Rock* (171 Fed. Rep. 240); *Ex parte Hubbard* (182 Fed. Rep. 76); *Ex parte Lewkowitz* (163 Fed. Rep. 646); *United States v. Williford* (220 Fed. Rep. 291).

The reasons given for these decisions are that the enlistment of a minor in the Army without the consent of his parent or guardian required by section 1117, R. S., "is not void, but voidable only"; that the soldier being not only *de facto* but *de jure* a soldier, he is subject to the Articles of War and may commit a military offense; and that if held for trial or punishment for a military offense, the interests of the public in the administration of justice are paramount to the right of the parent or guardian, and require that the soldier abide the consequences of his offense before the question of his discharge will be considered by the court. In the *Miller case* (114 Fed. Rep. 842), the court supported its holding by the analogy of a minor held for punishment for a civil offense, saying:

The common law, unaided by statute fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that

they could, by the writ of habeas corpus or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the military law just as the citizen who is a minor is amenable to the civil law. The parents can not prevent the law's enforcement in either case * * *.

The views here cited were approved in the *Reaves case* (126 Fed. Rep. 127), where upon full consideration of the authorities the Circuit Court of Appeals remanded Reaves, a minor, who had deserted from the Navy, to custody of the naval authorities as represented by the chief of police who had apprehended him. In the *Carver case* (142 Fed. Rep. 623) the syllabus is as follows:

A minor under the age of 18 years who unlawfully enlisted in the Army without the consent of his father can not be discharged from the service on a writ of habeas corpus sued out by his father so long as he is under arrest for desertion nor until he has been discharged from such custody or has served the sentence imposed on him by the military tribunal. In the *Lewkowicz case* (163 Fed. Rep. 846), the syllabus reads:

"A minor who by misrepresenting his age has fraudulently enlisted in the Army without the consent of his parents and thereby subjected himself to punishment under military law will not be relieved from such punishment by the civil courts by discharging him on a writ of habeas corpus on the application of his parents, even though the military prosecution is not instituted until after the writ was issued."

This was followed by the unanimous opinion in the Circuit Court of Appeals in the *Love case* (*United States v. Williford*, 220 Fed. Rep. 291), in which the court expressly approved the view stated in the *Lewkowicz case*, quoting section 761, R. S., relating to procedure under writs of habeas corpus, which reads as follows:

The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require.

The court added:

Law and justice do not, in our opinion, require Love to be withdrawn from the military authorities and relieved of liability for his offense in favor of his mother's right to his custody.

By act of July 27, 1892 (27 Stat. 278), "fraudulent enlistment and the receipt of pay or allowance thereunder" was made a military offense, punishable under the 62d Article of War. The offense is now defined in article 54, revised Articles of War, approved June 4, 1920 (41 Stat. 800), which provides that the offense "shall be punished as a court-martial may direct." A minor who procures his enlistment by willful misrepresentation or concealment as to his qualifications for enlistment, and receives pay or allowances under his enlistment, commits this offense, and the statute authorizes his punishment therefor. In general, it may be stated that where a minor

has committed a military offense the interests of the public in the administration of justice are paramount to the right of the parent and require that the soldier shall abide the consequences of his offense before the right to his discharge be passed upon. The soldier should not be allowed to escape punishment for his offense, even though his parents assert their right to his services. A minor in civil life is liable to punishment for a crime or misdemeanor, even though his confinement may interfere with the rights of his parents; and the above authorities clearly apply the same rule to a minor held for trial or punishment for a military offense.

APPENDIX 1

THE ARTICLES OF WAR

The articles included in this section* shall be known as the Articles of War and shall at all times and in all places govern the Armies of the United States.

I. PRELIMINARY PROVISIONS

ART. 1. Definitions.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

- (a) The word "officer" shall be construed to refer to a commissioned officer;
- (b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;
- (c) The word "company" shall be understood as including a troop or battery; and
- (d) The word "battalion" shall be understood as including a squadron.

ART. 2. Persons Subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

*Sec. 1, Ch. II, act of June 4, 1920 (41 Stat. 787), as amended by acts of Aug. 20, 1937 (50 Stat. 724, amending Arts. 50½ and 70), Aug. 1, 1942 (56 Stat. 732, amending Art. 50½), Dec. 14, 1942 (56 Stat. 1050, amending Art. 114) and Dec. 15, 1942 (56 Stat. 1051, amending Art. 52).

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

Patients in the Army and Navy General Hospital, Hot Springs, Ark. (Act of March 2, 1909; 35 Stat. 748.)

Personnel of the Coast and Geodetic Survey transferred to the service of the War Department. (Sec. 16, act of May 22, 1917; 40 Stat. 88.)

Personnel of the Lighthouse Service transferred to the service of the War Department. (Act of August 29, 1916; 39 Stat. 602.)

Inmates of the National Home for Disabled Volunteer Soldiers. (R. S. 4835.)

Personnel of the Public Health Service detailed in time of war for duty with the Army. (J. R. No. 9, July 9, 1917, 40 Stat. 242.)

Inmates of the Soldiers' Home. (R. S. 4824.)

Civilian employees, Dig. J. A. G., February, 1918, p. 7; Dig. J. A. G. 1918, pp. 79, 196; Dig. J. A. G. 1919, pp. 13, 339.

Members of Red Cross, Dig. J. A. G. April-December, 1917, p. 96; Dig. J. A. G. 1919, p. 96.

II. COURTS-MARTIAL

ART. 3. Courts-Martial Classified.—Courts-martial shall be of three kinds, namely:

First, general courts-martial;

Second, special courts-martial; and

Third, summary courts-martial.

A. COMPOSITION

ART. 4. Who May Serve on Courts-Martial.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.

Competency of retired officers (Dig. J. A. G. January-June, 1921, p. 55); of reserve officers on active duty (Dig. J. A. G. 1924, p. 7); of National Guard officer attending service school (Dig. J. A. G. 1924, p. 7).

All volunteer officers are competent to sit from the dates of their muster or acceptance into the military service of the United States; and all other officers lawfully called, drafted, or ordered into, or to duty or for training in, the military service of the United States; from the dates they are required by the terms of the call, draft, or order to obey the same.

As to presumption of competency, see Dig. J. A. G. 1922, p. 118.

ART. 5. General Courts-Martial.—General courts-martial may consist of any number of officers not less than five.

ART. 6. Special Courts-Martial.—Special courts-martial may consist of any number of officers not less than three.

ART. 7. Summary Courts-Martial.—A summary court-martial shall consist of one officer.

B. BY WHOM APPOINTED

ART. 8. General Courts-Martial.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the

commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

The order appointing a general court-martial when issued by a commander specially empowered thereto by the President need not cite the order of the President. (Dig J A G 1921, p 56)

ART. 9. Special Courts-Martial.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial, but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

ART. 10. Summary Courts-Martial.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

ART. 11. Appointment of Trial Judge Advocates and Counsel.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided, however*, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case.

C JURISDICTION

ART. 12. General Courts-Martial.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: *Provided further*, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a

special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed.

ART. 12. Special Courts-Martial.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months.

ART. 14. Summary Courts-Martial.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

ART. 15. Jurisdiction not Exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals.

ART. 16. Officers; How Triable.—Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

The provision as to rank is directory only on the appointing authority. The sentence of a court can not be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable. (See *Swain v. U. S.*, 165 U. S. 553.)

D. PROCEDURE

ART. 17. Trial Judge Advocate to Prosecute; Counsel to Defend.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

ART. 18. Challenges.—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall

not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

ART. 19. Oaths.—The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

ART. 20. Continuances.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

ART. 21. Refusal or Failure to Plead.—When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty imprudently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.

ART. 22. Process to Obtain Witnesses.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to

issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its territories, and possessions.

ART. 23. Refusal to Appear or Testify.—Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$300 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: *Provided further*, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this Act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States" (volume 85, United States Statutes at Large, p. 1088), or any amendment thereof, shall be punished as therein provided.

ART. 24. Compulsory Self-Incrimination Prohibited.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

ART. 25. Depositions—When Admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases.

ART. 26. Depositions—Before Whom Taken.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

ART. 27. Courts of Inquiry—Records of, When Admissible.—The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

ART. 28. Certain Acts to Constitute Desertion.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

ART. 29. Court to Announce Action.—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe the findings and sentence in other cases may be similarly announced.

ART. 30. Closed Sessions.—Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if there be any.

ART. 31. Method of Voting.—Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. The law member of the court, if any, or if there be no law member of the court, then the president, may rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of the court if any member object thereto the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member object to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *Provided further, however*, That the phrase, "objection to the admissibility of evidence offered during the trial," as used in the next preceding proviso hereof, shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the

recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses alleged to be mentally incompetent, and the like, nor as to the insanity of accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all these questions arising on the trial, if any member object to any ruling of the law member, the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid.

ART. 32. Contempts.—A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: *Provided*, That such punishment shall in no case exceed one month's confinement, or a fine of \$100, or both.

ART. 33. Records—General Courts-Martial.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court.

ART. 34. Records—Special and Summary Courts-Martial.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

ART. 35. Disposition of Records—General Courts-Martial.—The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army.

ART. 36. Disposition of Records—Special and Summary Courts-Martial.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of summary courts-martial may be destroyed.

The last sentence of the preceding article has been modified by sec. 9 of the act of August 5, 1889 (53 Stat. 1219), as amended by the act of March 13, 1942 (56 Stat. 171), which provides that Government records shall not be alienated or destroyed except by authority obtained thereunder.

ART. 37. Irregularities—Effect of.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial

rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

ART. 38. President May Prescribe Rules.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States; *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

E. LIMITATIONS UPON PROSECUTIONS

ART. 39. As to Time.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation. *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

"Manifest impediment" as used in the eighty-eighth article (a predecessor of the present thirty-ninth Article of War) does not mean merely want of evidence, or ignorance as to the offender or offense by the military authorities, but it means something akin to absence, want of power, or a physical inability to bring the party charged to trial. A "manifest impediment" does not exist where the military authorities, by reasonable diligence, could make such party amenable to justice; and any concealment of the evidence of his guilt, or other like fraud on his part by which the prosecution is delayed until the time of the bar has run, does not in and of itself deprive him of the benefit of the statute (14 Op. Atty. Gen. 285).

ART. 40. As to Number.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

- (a) An acquittal; or
- (b) A finding of not guilty of any specification; or
- (c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or

(4) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

The findings of an Army administrative board, or a proceeding before an investigating board, can not preclude trial by court-martial. (Dig. J. A. G. 1928, p. 99; Dig. J. A. G. 1922, p. 62.)

F. PUNISHMENTS

ART. 41. Cruel and Unusual Punishments Prohibited.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body are prohibited.

ART. 42. Places of Confinement—When Lawful.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

ART. 43. Death Sentence—When Lawful.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

ART. 44. Cowardice; Fraud—Accessory Penalty.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

ART. 45. Maximum Limit.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from

time to time prescribe: *Provided*, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses.

G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY

ART. 46. Action by Convening Authority.—Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

ART. 47. Powers incident to Power to Approve.—The power to approve the sentence of a court-martial shall be held to include:

(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to approve or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50^{1/2}.

ART. 48. Confirmation—When Required.—In addition to the approval required by article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

(a) Any sentence respecting a general officer.

(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

(c) Any sentence extending to the suspension or dismissal of a cadet; and

(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50^{1/2}, upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

The reviewing authority, who was the commanding general of the American Expeditionary Forces in Siberia, which consisted of two regiments of Infantry and some special units, directed the execution of the sentence of dismissal of an officer. The words "Army" and "Expeditionary Forces" are not synonymous. * * * Such reviewing authority was without power under A. W. 48 to confirm an order executing a sentence of dismissal of an officer. (Dig. J. A. G., 1919, p. 46.)

ART. 49. Powers incident to Power to Confirm.—The power to confirm the sentence of a court-martial shall be held to include:

(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power

to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to confirm or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50½.

ART. 50. Mitigation or Remission of Sentence.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence.

Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed.

The power of remission or mitigation shall extend to all uncollected forfeitures adjudged by sentence of court-martial.

ART. 50½. Review: Rehearing.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 48, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or

sentences, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part: *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: *Provided further*, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the

President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilt, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government: *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: *Provided further*, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the Board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

Accused was sentenced to dishonorable discharge, all forfeitures, and 10 years' confinement. The reviewing authority approved the sentence, but reduced the period of confinement to five years and forwarded the record of trial for review under the provisions of A. W. 50½. The board of review, the Acting Judge Advocate General concurring, held the record of trial legally sufficient to support the sentence. In publishing the general court-martial order in the case no mention was made of the reduction in the term of confinement. *Held*, That the only sentence acted upon by the board of review and the Judge Advocate General was the one as originally approved by the reviewing authority and that the reviewing authority did not have the power to order a greater sentence into execution (Dig. J. A. G. 1922, p. 71.)

When under this article the board of review holds a record of trial legally insufficient to support the findings or sentence, and such holding is concurred in by the Judge Advocate General, such finding or sentence is thereby vacated and the same can not be reconsidered for the purpose of reversing such holding. (Dig. J. A. G. 1923, p. 52.)

Except where the President is the reviewing or confirming authority, it is not the function of the board of review or the Judge Advocate General, in passing upon the legal sufficiency of a record under A. W. 50½, to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. In such cases the law gives to the court-martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby; therefore, if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilt, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts. C. M. 152797

When both the board of review and the Judge Advocate General hold the record of trial by general court-martial to be legally insufficient to support a sentence requiring confirmation by the President before its execution, the record should not be submitted to the Secretary of War for the action of the President but

should be returned to the reviewing authority in accordance with the provisions of A. W. 504 for rehearing or such other action as may be proper. (Opn. 7, A. G., December 29, 1922, approved by the Secretary of War December 30, 1922, in C. M. 154185.)

When under the provisions of A. W. 504 the Judge Advocate General advises the reviewing or confirming authority of the holding of the board of review, and his concurrence therein, he may in a separate communication, for reasons stated therein, advise such reviewing or confirming authority that he deems the sentence unnecessarily severe or that in his opinion one or more of the findings of guilty should be disapproved.

ART. 51. Suspension of Sentences of Dismissal or Death.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

ART. 52. Suspension of Sentences.—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War, the commanding officer holding general court-martial jurisdiction over any such offender, or the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks in which the person under sentence is held, a court of the kind that imposed the sentence, may at any time hereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

ART. 53. Execution or Remission—Confinement in Disciplinary Barracks.—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War.

III. PUNITIVE ARTICLES

A. ENLISTMENT; MUSTER; RETURNS

ART. 54. Fraudulent Enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

ART. 55. Officer Making Unlawful Enlistment.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in, is

prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

ART. 54. False Muster.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 57. False Returns—Omission to Render Returns.—Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

B. DESERTION; ABSENCE WITHOUT LEAVE

ART. 58. Desertion.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 59. Advising or Aiding Another to Desert.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 60. Entertaining a Deserter.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

ART. 61. Absence Without Leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

C. DISRESPECT; INSUBORDINATION; MUTINY

ART. 62. Disrespect Toward the President, Vice President, Congress, Secretary of War, Governors, Legislatures.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

ART. 63. Disrespect Toward Superior Officer.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

ART. 64. Assaulting or Willfully Disobeying Superior Officer.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

ART. 65. Insubordinate Conduct Toward Noncommissioned Officer.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language or behavior in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

ART. 66. Mutiny or Sedition.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

ART. 67. Failure to Suppress Mutiny or Sedition.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

ART. 68. Quarrels; Frays; Disorders.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct.

D. ARREST; CONFINEMENT

ART. 69. Arrest or Confinement.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

ART. 70. Charges; Action Upon.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal

knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as heretofore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

ART. 71. Refusal to Receive and Keep Prisoners.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

ART. 72. Report of Prisoners Received.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 73. Releasing Prisoner Without Proper Authority.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 74. Delivery of Offenders to Civil Authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union

and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

See Dig. J. A. G. 1912, pp. 134-136.

"When any civil official of the State of . . . attempts to arrest any person subject to military law upon the military reservation at Fort . . . , the person whose arrest is sought must inform the civil official that he is required to make the arrest through the post commander and that the person whose arrest is sought can not otherwise submit. If, after this, the civil official persists, the arrest will be prevented unless the procedure indicated under the 74th Article of War is followed." The foregoing instruction by a corps area commander was held subject to no objection. (See Dig. J. A. G. 1925, p. 1)

E. WAR OFFENSES

ART. 75. Misbehavior Before the Enemy.—Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

ART. 76. Subordinates Compelling Commander to Surrender.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.

ART. 77. Improper Use of Countersign.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

ART. 78. Forcing a Safeguard.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 79. Captured Property to be Secured for Public Service.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

ART. 80. Dealing in Captured or Abandoned Property.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

ART. 81. Relieving, Corresponding With, or Aiding the Enemy.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 82. Spies.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

F. MISCELLANEOUS CRIMES AND OFFENSES

ART. 83. Military Property—Willful or Negligent Loss, Damage or Wrongful Disposition.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

ART. 84. Waste or Unlawful Disposition of Military Property Issued to Soldiers.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

ART. 85. Drunk on Duty.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty, shall be punished as a court-martial may direct.

ART. 86. Misbehavior of Sentinel.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

ART. 87. Personal Interest in Sale of Provisions.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessities of life brought into such garrison, fort, barracks, camp, or other place for the use of troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 88. Intimidation of Persons Bringing Provisions.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessities to the camp, garrison,

or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

ART. 90. Good Order to be Maintained and Wrongs Redressed.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

ART. 90. Provoking Speeches or Gestures.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

ART. 91. Dueling.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

ART. 92. Murder—Rape.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

ART. 94. Frauds Against the Government.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls.

The provision of this article that any person guilty of an offense thereunder while in the military service is subject to arrest and trial by court-martial thereafter after his discharge will not be held unconstitutional by a court of the first instance, in view of the fact that it has been in effect and enforced for sixty years. (*Ex parte Joly*, 290 Fed. 858.) (*Dig. J. A. G. 1923*, p. 99.)

ART. 85. Conduct Unbecoming an Officer and Gentleman.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Offenses under A. W. 95 and A. W. 96 are not the same, nor established by the same evidence, the former being applicable to officers and cadets; and the conviction of an officer under both articles on the same facts held not illegal as placing him twice in jeopardy for the same offense. (*McRae v. Henkes*, 278 Fed. 108.) (*Dig. J. A. G. 1922*, p. 118.)

ART. 96. General Article.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

IV. COURTS OF INQUIRY

ART. 97. When and by Whom Ordered.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

ART. 98. Composition.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

ART. 99. Challenges.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

ART. 100. Oath of Members and Recorders.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

ART. 101. Powers; Procedure.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

ART. 102. Opinion on Merits of Case.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

ART. 103. Record of Proceedings—How Authenticated.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

V. MISCELLANEOUS PROVISIONS

ART. 104. Disciplinary Powers of Commanding Officers.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

ART. 105. Injuries to Property—Redress of.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

Civilian employees of the Army within the territorial jurisdiction of the United States in time of peace are not "persons subject to military control" within the meaning of A. W. 2 and A. W. 106, and the stoppage of their pay to reimburse owners of private property for damages due to the fault or negligence of such civilian employee is not authorized. (3 Comp. Gen. 999.) (Dig. J. A. G. 1924, p. 38.)

ARTICLES OF WAR

A municipal corporation is, for civil purposes, deemed a "person" (*United States v. Amedy*, 11 Wheat. 392, 413) and is so considered within the meaning of A. W. 105. (Dig. J. A. G. 1919, p. 172.)

Insurance company has no right of subrogation. (Dig. J. A. G., 1922, p. 4.)

ART. 104. Arrest of Deserters by Civil Officials.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

ART. 107. Soldiers to Make Good Time Lost.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

ART. 108. Soldiers—Separation From the Service.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

ART. 109. Oath of Enlistment.—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ———, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War." This oath or affirmation may be taken before any officer.

ART. 110. Certain Articles to be Read and Explained.—Articles 1, 2, and 29, 54 to 96, inclusive, and 104 to 109, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

ART. 111. Copy of Record of Trial.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

ART. 112. Effects of Deceased Persons—Disposition of.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money be-

longing to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

The Quartermaster Department was consolidated into the Quartermaster Corps by sec. 3 of the act of Aug. 24, 1912 (37 Stat. 591).

The powers and duties of the Auditor for the War Department were vested in the General Accounting Office by sec. 304 of the act of June 10, 1921 (42 Stat. 24).

ART. 113. Inquests.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

ART. 114. Authority to Administer Oaths.—Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Department, any staff judge-advocate or acting staff judge advocate, the President of a general or special court-martial, any summary court-martial, the trial judge advocate of any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military

ART. 110. *Notaries Public.*—Notaries public shall be appointed by the President in time of war or public danger, and shall exercise the general powers of a notary public in the administration of oaths, the execution and acknowledgement of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law: *Provided*, That no fee of any character shall be paid to any officer mentioned in this Act for the performance of any notarial act herein authorized.

A warrant officer serving as assistant adjutant of any command has power to administer oaths for all purposes of military administration. *See sec. 4, act August 21, 1941 (55 Stat. 653).*

ART. 115. *Appointment of Reporters and Interpreters.*—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

ART. 116. *Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.*—An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.

ART. 117. *Removal of Civil Suits.*—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

ART. 118. *Officers, Separation From Service.*—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

This article does not apply to warrant officers. (Dig. J. A. G., 1922, p. 49.)

ART. 119. *Rank and Precedence Among Regulars, Militia, and Volunteers.*—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department,

or command, or of any organization thereof, without regard to seniority of rank in the same grade.

ART. 120. Command When Different Corps or Commands Happen to Join.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

ART. 121. Complaints of Wrongs.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

SEC. 2. That the provisions of Chapter II of this Act shall take effect and be in force eight months after the approval of this Act: *Provided*, That articles 2, 23, and 45 shall take effect immediately.

SEC. 3. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of Chapter II of this Act, under any law embraced in or modified, changed, or repealed by Chapter II of this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed.

SEC. 4. That section 1342 of the Revised Statutes of the United States be, and the same is hereby, repealed, and all laws and parts of laws insofar as they are inconsistent with this Act are hereby repealed.

APPENDIX 2

FORMS FOR ORDERS APPOINTING COURTS-MARTIAL

a. FORM OF ORDER APPOINTING A GENERAL COURT-MARTIAL

Headquarters _____ (Corps Area) (Division) (Department),
(Place) _____ (Date) _____ 19____.

Special Orders,)

No —, |

A general court-martial is appointed to meet at _____, _____, at _____
_____ on _____ 19____, or as soon thereafter as practicable, for the trial of
such persons as may be properly brought before it.

DETAIL FOR THE COURT

Col. _____, Fifth Cavalry.

Lieut. Col. _____, First Infantry.

Lieut. Col. _____, Third Field Artillery.

Maj. _____, J. A. G. D., law member.

Maj. _____, Third Field Artillery.

Capt. _____, Fourth Infantry.

Capt. _____, Fifth Cavalry.

Capt. _____, First Infantry.

Capt. _____, Third Field Artillery.

Capt. _____, Fifth Cavalry, trial judge advocate.

First Lieut. _____, Third Field Artillery, assistant trial judge advocate.

Capt. _____, Fourth Infantry, defense counsel.

First Lieut. _____, Fourth Infantry, assistant defense counsel

Notes—The order will be authenticated as may be prescribed in Army Regulations.

A succession of orders modifying an order appointing a court-martial is liable to result
in serious errors. When practicable it should be avoided by appointing a new court

The order should name the members in order of rank.

The following paragraphs of the manual are referred to in connection with the
appointment of courts-martial: 4 (Composition of courts-martial); 5 (Appointing author-
ities); 36 (Appointment of courts-martial); 41 and 43 (Selection of trial judge advocate
and defense counsel)

If travel is necessary, a paragraph directing such travel may be included in the
appointing order, or a separate order or orders may be issued according to circumstances.

The order will specifically designate the law member as such.

The order appointing a general court-martial when issued by a commander specially
empowered thereto by the President, may, but need not, cite the order of the President.

A FORM OF ORDER APPOINTING A SPECIAL COURT-MARTIAL.

Special Orders, } Headquarters _____,
 No. _____ (Place) _____, (Date) _____, 19____.

A special court-martial is appointed to meet at _____, _____ at _____, _____, 19____, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

Maj. _____, First Cavalry.

Capt. _____, Third Cavalry.

Capt. _____, Fourth Coast Artillery.

First Lieut. _____, Third Cavalry.

First Lieut. _____, First Infantry.

Capt. _____, Fourth Coast Artillery, trial judge advocate.

Capt. _____, Third Cavalry, defense counsel.

(In case the appointing authority desires that the testimony be reduced to writing the following sentence will be added: The testimony will be reduced to writing and the president is authorized to employ a reporter.)

Notes.—See the first five notes to preceding form

When a superior appoints a court because a subordinate commanding officer is the accuser or prosecutor, he may specify in the order the names of the person or persons to be tried.

c. FORM OF ORDER APPOINTING A SUMMARY COURT-MARTIAL

This form is similar to the form for special court-martial except that only one officer is detailed, and the employment of a reporter can not be authorized. As to appointment of summary courts-martial, see 5c.

APPENDIX 3
CHARGE SHEET

_____, 19____
(Place) (Date)

Name, etc., of accused _____
(Give last name, first name and middle initial in that order,
followed by serial number, grade, company, regiment, branch or by other appropriate
description of accused. Allow names, etc., to follow in same manner)

Age _____ Pay, \$_____ per month. Allotments to dependents, \$_____
(Base pay plus pay for length of service)
per month Government Insurance deduction, \$_____ per month.

Data as to service: _____
(As to each terminated enlistment, give including dates of service
and organization in which serving at termination. As to current enlistment, give the ini-
tial date and the term thereof. Give similar data as to service not under an enlistment)

Data as to witnesses, etc.: _____
(Give names, addresses and note if for accused. List docu-
mentary evidence and note where each item thereof may be found)

Data as to restraint of accused: _____
(Give date, place and initial date of any
restraint of accused)

(End of page 1 of Charge Sheet)

CHARGE: Violation of the _____ Article of War
Specification: _____
(End of page 2 of Charge Sheet)

(Signature of accuser) _____

(Grade, organization, and branch) _____

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this _____ day of _____, 19____, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he * has personal knowledge of the matters set forth in specifications _____; and * has

(Indicate by specifications and charge numbers)

investigated the matters set forth in specifications _____

(Indicate by specification and charge numbers)

and that the same are true in fact, to the best of his knowledge and belief.

(Signature) _____

(Rank and organization) _____

(Official character as summary court, notary public, etc.) _____

(Note—At (*) strike out words not applicable)

If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated.

If the oath is administered by a civil officer having a seal, his official seal should be affixed.

(1st Ind)

Headquarters _____

(Place)

_____, 19____
(Date)

Referred for trial to _____

(Rank, name, and organization of summary court or trial judge court-martial ap-

advocate) (Summary) (Trial judge advocate of special or general)

pointed by paragraph _____, Special Orders No. _____, Headquarters _____
19____.

By _____ of _____

(Command or order)

(Rank and name of commanding officer)

_____, Adjutant.

(End of Page 3 of Charge Sheet)

APPENDIX 4

FORMS FOR CHARGES AND SPECIFICATIONS

INSTRUCTIONS

a. *General.*—The forms are intended as a general guide for use in the drafting of charges and specifications, not only for the offenses specifically provided for, but for other like offenses. The several forms of specifications are not mandatory and may be added to or deviated from. The serial number of an accused should not be alleged in a specification. See 24-29 (Preparation of charges).

b. *Numbering of charges and specifications.*—When there is more than one charge the charges should be numbered, using the Roman numerals, viz, I, II, etc. When there is more than one specification under a charge the specifications under that charge should be numbered, using the Arabic numerals, viz, 1, 2, etc.

c. *Name and description of accused.*—The name of the accused as stated in the specification should include his Christian name, and middle name or initial, and except in a case in which the jurisdiction of the court over the person is not dependant upon his being a person subject to military law (e. g., see A. W. 81 and 82), should be accompanied by such descriptive language as will show that he is a person subject to military law and therefore subject to the jurisdiction of the court as to persons. Thus, in the ordinary case of a soldier, the specification should read "In that Private John Smith, Company A, 7th Inf. did," etc.

These forms apply whether the accused is a member of the Regular Army, or of volunteer forces accepted or mustered into the military service of the United States, or of the National Guard, or of other forces which may have been drafted, called, or ordered into, or to duty or for training in, the military service of the United States. If, however, the accused has not obeyed the call, draft, or order, his name should be followed by the words "lawfully called (drafted) (ordered) into the military service of the United States."

If the accused has not been assigned to an organization, the word "unassigned" may be employed.

In the case of a cadet, the specification should read "In that Cadet John Smith, United States Military Academy, did" etc.

In the case of a member of the Marine Corps detached for service with the armies of the United States by order of the President, the words "detached for service with the armies of the United States by order of the President" should follow the other words of identification and description. When the accused is an officer or enlisted man of the Medical Department of the Navy, serving with a body of Marines detached for service with the armies of the United States by order of the President, this fact should be alleged as follows: "In that ———, Medical Department of the Navy, serving with a body of Marines detached for service with the armies of the United States by order of the President, did," etc.

As to the persons made subject to military law by A. W. 2 (d), the words "a retainer to the camp of United States troops without the territorial jurisdiction of the United States," or "a person accompanying the armies of the

United States without the territorial jurisdiction of the United States," or "a person serving with the armies of the United States without the territorial jurisdiction of the United States," should be employed, unless it be in time of war, when the words "a retainer to the camp of United States troops in the field," or "a person accompanying the armies of the United States in the field," or "a person serving with the armies of the United States in the field," should be used, according to the circumstances of each case. Where jurisdiction is asserted under A. W. 2 (e), the name of the accused should be followed by the words "a person under sentence adjudged by court-martial," or if he is a general prisoner, he may be described as "General Prisoner John Smith."

d. *Use of aliases.*—Where without discharge a soldier enlists two or more times, each time under a different name, he should be charged under the name, etc., pertaining to his first untermiated enlistment with the other names, etc., under aliases; thus "Private John Smith, Company B, Seventh Infantry, alias Private John Brown, Company A, Tenth Infantry."

e. *In case of change of grade.*—Where the grade of the accused has changed since the date of an alleged offense, the accused should be designated by his present grade followed by a statement of his grade at the date of the alleged offense, thus: In that Private A B, Company —, ——— Infantry, then Sergeant, Company —, ——— Infantry, did, etc.

f. *Form of specification in joint offense.*—In the case of a joint offense each accused may be charged as if he alone was concerned or the specifications may be in accordance with the principles of the following examples, depending on the decision of the person preferring the charges as to how the persons concerned should be tried:

In that Private A, Company —, ——— Infantry, and Private C, Company —, ——— Infantry, acting jointly, and in pursuance of a common intent, did (here allege place, time, and offense as when charging one person).

In that Private A, Company —, ——— Infantry, and Private B, Company —, ——— Infantry, acting jointly and in pursuance of a common intent, did, in conjunction with Private C, Company —, ——— Infantry (here allege place, time and offense).

In that Private C, Company —, ——— Infantry, did, in conjunction with Private A, Company —, ——— Infantry, and Private B, Company —, ——— Infantry (here allege place, time and offense).

g. *Place and date of offense.*—The place and date of the commission of the alleged offense will, as a rule, be stated in the body of each specification and not in a separate line at the end thereof. The allegations of the time and place of the commission of an offense should be stated as accurately as possible, but where the act or acts charged extend over a considerable period of time it may be necessary to cover such period in the allegation. Thus, allegations of "from March to September, 1887," and "from May to October, 1888," have been countenanced in a case in which the accused was charged with the neglect of a duty that required continuous performance. So, also, it is proper to allege that an offense was committed while "en route" between certain points. So where the exact time or place of the commission of the offense is not known it is frequently preferable to allege it as having occurred "on or about" a certain date or time, or "at or near" a certain locality, rather than to aver it as committed on a particular day or between two specified days or at a particular place. There is no defined construction to be placed upon the words "on or about" as used in the allegation of time in a specification. The phrase can not be said to cover any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating some period, as nearly

as can be ascertained and set forth, at or during which the offenses charged are believed to have been committed in cases where the exact day can not well be named. And the same is to be said as to the use of the words "at or near" in connection with the averment of place.

SPECIMEN CHARGES

Charge I: Violation of the 54th Article of War.

Specification: In that Private Richard Roe, Company A, Second Infantry, alias Private John Doe, Company F, Twenty-ninth Infantry, did under the name of John Doe, at Fort Jay, N. Y., on July 24, 1917, by willfully concealing the fact he was then a private in said Company A, Second Infantry, procure himself to be enlisted in the military service of the United States by Capt. William White, Medical Corps, and did thereafter at Fort Jay, N. Y., receive allowances under the enlistment so procured.

Charge II: Violation of the 58th Article of War.

Specification: In that Private Richard Roe, Company A, Second Infantry, alias Private John Doe, Company F, Twenty-ninth Infantry, did, at Fort Sheridan, Ill., on or about March 6, 1917, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Jay, N. Y., on or about August 5, 1917.

Charge III: Violation of the 96th Article of War.

Specification 1: In that Private Richard Roe, Company A, Second Infantry, alias Private John Doe, Company F, Twenty-ninth Infantry, did at Fort Sheridan, Ill., on or about March 6, 1917, wrongfully strike Private John Brown, Company A, Second Infantry, a sentinel in the execution of his duty, in the face with his fist.

Specification 2: In that Private Richard Roe, Company A, Second Infantry, alias Private John Doe, Company F, Twenty-ninth Infantry, having received a lawful order from Private John Brown, Company A, Second Infantry, a sentinel in the execution of his duty, to halt, did at Fort Sheridan, Ill., on or about March 6, 1917, willfully disobey the same.

JOHN JONES,
Captain, U. S. A.

FORMS FOR SPECIFICATIONS

A. W. 54

*Provisional
enlistment.*

1. See specification under Charge I of specimen charges above, and d (Use of aliases) in instructions above.

2. In that _____ did, at _____, on or about _____, 19____, by willfully [misrepresenting that he was then (a citizen of the United States) (single) (21 years of age) (_____) when in fact he was then (not a citizen of the United States) (married) (17 years of age) (_____)] [concealing the fact (that on or about _____, 19____, he had been convicted of a felony, to wit, _____ by the _____ court in and for _____) (that from about _____, 19____, to about _____, 19____, he had been imprisoned in a reformatory (jail) (penitentiary) under sentence of a court) (that on or about _____, 19____, he was discharged from the (Army)

(Navy) (—) (on account of disability) (through sentence of a (civil) (military) (naval) court) (with character less than good) (that —)] procure himself to be enlisted in the military service of the United States by —; and did thereafter at —, receive (pay) (allowances) (pay and allowances) under the enlistment so procured.

A. W. 55

3. In that — did, at —, on or about —, 19—, knowingly (enlist) (muster) into the military service of the United States one —, who, as he, the said —, then well knew, was (an) (insane) (intoxicated) (—) (a) person (who had been convicted of a felony) (under the age of 16 years) (—), whose (enlistment) (muster) was prohibited by (law) (regulations) (orders).

Making prohibited enlistment or muster.

A. W. 56

4. In that — did, at —, on or about —, 19—, knowingly make a false muster of (—) as (present) (—) when the said —, as he, the said —, then well knew, was not (present) (—), but was (absent with leave) (—).

False muster.

5. In that — did, at —, on or about —, 19—, knowingly make a false muster of (—) as a soldier and a member of (—), when the said —, as he, the said —, then well knew, was not a soldier and a member of said (—) but was a (civilian) (—).

6. In that — did, at —, on or about —, 19—, (sign) (direct — to sign) (allow — to sign) the muster roll of —, for the period — to —, 19—, he, the said —, then well knowing that the said muster roll contained the name of — as (a soldier and a member of said —) (an officer of said —) (and as present for duty therewith), and that the said — was not (a soldier) (a member of said —) (an officer of said —) (present for duty) but was then (a civilian) (a member of company —) (wholly absent from military duty), (—).

7. In that — did, at —, on or about —, 19—, (sign) (direct — to sign) (allow — to sign) the muster roll of —, for the period — to —, 19—, he, the said —, then well knowing that the said muster roll contained a false statement that — (a) (private) (—) of said (—) was (present) (present and mustered) (—), and that said statement was false, in that the said — was not (present) (present and mustered) (—) but was then (absent with leave) (absent without leave) (—).

8. In that — did, at —, on or about —, 19—, wrongfully take from — (the sum of \$—) (—), as a consideration to him —, for knowingly permitting the muster-roll of — on the mustering in of that — falsely to show as (mustered in) (—), —, who, as he, the said —, then well knew, was (were) not (mustered in) (—).

9. In that — did, at —, on or about —, 19—, wrongfully take from — the sum of \$—, (—), as a

consideration to him —, for allowing the muster roll of —, for the period of — to —, 19—, to show — as (present and mustered) (—), when, as he, the said —, then well knew, he (they) was (were) not present and mustered as shown on said muster roll.

10. In that —, did, at —, on or about —, 19—, knowingly muster one — as (an officer) (a soldier) of —, when the said —, as he, the said —, then well knew was not (an officer) (a soldier) of —, but was then a (civilian) (—).

A. W. 57

False returns:
variation to
muster returns.

11. In that —, being in command of —, and it being his duty to render to — a return of the state of (the troops under his command) (the — thereunto belonging) for the period — to —, 19—, did, at —, on or about —, 19—, knowingly make a false return for said period, which return was false in that it showed (one — as absent with leave) (—), when as he, the said —, then well knew (the said — was absent without leave) (—).

12. In that —, being in command of —, and it being his duty to render to the — a return of the state of (the troops under his command) (the — thereto belonging) for the period — to —, did (on and after —, 19—) (from — until —), through (neglect) (design), omit to render such return.

A. W. 58

Desertion.

13. In that — did, at — on or about —, 19— (in the execution of a conspiracy to desert the service of the United States, previously entered into with — and —) desert the service of the United States and did remain absent in desertion until he (was apprehended) (surrendered himself) at — on or about —, 19—.

Desertion in
execution of
conspiracy.

14. In that — did, at — on or about —, 19—, (in the execution of a conspiracy to desert the service of the United States previously entered into with — and —) desert the service of the United States by (quitting) (absenting himself without proper leave from) his (organization) (place of duty), with intent (to avoid hazardous duty, to wit: —) (to shirk important service, to wit: —), and did remain absent in desertion until he (was apprehended) (surrendered himself) at — on or about —, 19—.

Attempt to
desert.

15. In that — did, at — on or about —, 19— (in the execution of a conspiracy to desert the service of the United States previously entered into with — and —) attempt to desert the service of the United States by (here insert the overt act done toward accomplishing the purpose to desert) with intent [permanently to absent himself without proper leave from his post and proper duties] (to (quit) (absent himself without proper leave from) his (organization) (place of duty) in order to (avoid hazardous duty, to wit: —) (shirk important service, to wit: —)].

A. W. 59

16. In that ——— did, at ———, on or about ———, 19—, by (saying to him "———" or words to that effect) (———) advise Private ———, Company ———, ——— Infantry, to desert the service of the United States.

Advising
desertion.

17. In that ——— did, at ———, on or about ——— 19—, by (here insert manner and form of persuasion or assistance) (persuade) (knowingly assist) Private ———, Company ———, ——— Infantry, to desert the service of the United States at ———, on or about ———, 19—.

Assisting
desertion.

A. W. 60

18. In that ———, having discovered that ———, a soldier in his command, was a deserter from the (military service) (naval service) (Marine Corps) did, at ———, from about ——— to about ———, 19—, retain said deserter in his command without informing superior authority or the commander of the organization to which the deserter belonged of the presence of said deserter in his command.

Entertaining a
deserter.

A. W. 61

19. In that ——— did, at ———, on or about ———, 19—, fail to repair at the fixed time to the properly appointed place (of assembly) for ———

Failing to
repair.

20. In that ——— did, at ———, on or about ———, 19—, without proper leave, go from the properly appointed place (of assembly) for ———, after having repaired thereto for the performance of said duty.

Quitting duty.

21. In that ———, did (without proper leave, absent himself from his ——— at ——— from about ———, 19—, to about ———, 19—.

A. W. O. L.

22. In that ———, being on guard as a ———, did at ———, on or about ———, 19—, absent himself without proper leave from his guard with intent to abandon the same.

Abandoning
guard.

A. W. 62

23. In that ——— did, at ———, on or about ———, 19—, use (orally and publicly) (———) the following (contemptuous) (disrespectful) (contemptuous and disrespectful) words against the (President) (Vice President) (Congress of the United States) (Secretary of War) [(Governor) (Legislature) of the (State of ———) (Territory of ———) (———, a possession of the United States, in which he, the said ——— was then quartered] to wit: "——— ——— ———," or words to that effect.

Disrespect to
President, etc.

A. W. 63

24. In that ——— did, at ———, on or about ———, 19—, behave himself with disrespect toward ———, his superior officer, by (saying to him ———, or words to that effect) (contemptuously turning from and leaving him while he was talking to him the said ———) (———).

Disrespect to
superior officer.

A. W. 64

**Striking
superior officer.**

25. In that ——— did, at ———, on or about ———, 19—, strike ———, his superior officer, who was then in the execution of his office (in) (on) the ——— with (a) (his) ———,

**Drawing, etc.,
weapon against
superior officer.**

26. In that ——— did, at ———, on or about ———, 19—, (draw) (lift up) a weapon, to wit a ——— against ———, his superior officer, who was then in the execution of his office.

**Offering
violence to
superior officer.**

27. In that ——— did, at ——— on or about ———, 19—, offer violence against ———, his superior officer, who was then in the execution of his office, in that he, the said ———, did ———,

**Willful dis-
obedience of
superior officer.**

28. In that ———, having received a lawful command from ———, his superior officer, to ———, did at ———, on or about ———, 19—, willfully disobey the same.

A. W. 65

**Assault on
warrant officer
or A. C. C.**

29. In that ——— did, at ———, on or about ———, 19—, (strike) (assault) ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office, by ——— him (in) (on) the ——— with (a) (his) ———.

**Attempt or
threat to strike,
etc., a warrant
officer or A. C. C.**

30. In that ——— did, at ———, on or about ———, 19—, (attempt) (threaten) to (strike) (assault) ———, a (warrant officer) (noncommissioned officer) [(in) (on) the ———] with (a) (his) ———, while said ——— was in the execution of his office.

**Willful dis-
obedience of
warrant officer
or A. C. C.**

31. In that ———, having received a lawful order from ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office, to ———, did at ———, on or about ———, 19—, willfully disobey the same.

**Threats, insults,
insubordination,
and disrespect
toward warrant
officer or A. C. C.**

32. In that ——— did, at ———, on or about ———, 19—, [use the following (threatening) (insulting) (threatening and insulting) language], [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office ["——— ———," or words to that effect] [by ———].

A. W. 66

Mutiny, sedition.

33. In that ——— did, at ———, on or about ———, 19—, (attempt to create) (begin) (excite) (cause) a mutiny in ——— by [urging the members of said ——— concertedly to refuse to obey the lawful orders of ———, their (commanding) (superior) officer, to ———] [unlawfully assuming control over about ——— soldiers of said (command) (———), and in the execution of such control causing said soldiers concertedly to disregard and defy the lawful orders of ———, their (commanding) (superior) officer to (assemble for drill) (———),] [———], with the intent to (usurp) (subvert) (override) (usurp, subvert, and override), for the time being, lawful military authority.

34. In that ——— did, at ———, on or about ———, 19—, voluntarily join in a mutiny which had been begun in ——— against the lawful military authority of ———, the commanding

officer thereof, and did, with intent to (usurp) (subvert) (override) (usurp, subvert, and override) for the time being, in concert with sundry other members of said — assembled on the (parade ground) (—), refuse to (disperse) (do any further duty) (assemble for drill) (—).

A. W. 67

35. In that —, being present at a (mutiny) (sedition) among the soldiers of —, did, at —, on or about —, 19—, fail to use his utmost endeavor to suppress the same, in that (having commanded the men of his own company to return to their quarters, he took no means to compel their obedience or reduce them to discipline upon their refusal to obey said command) (—).

Failure to suppress mutiny or sedition.

36. In that —, being at — and (knowing) (having reason to believe) on —, 19—, that a (mutiny) (sedition) was to take place in —, on or about —, 19—, did fail to give without delay information of said intended (mutiny) (sedition) to his commanding officer

Failing to give information of mutiny, etc.

A. W. 68

37. In that —, being engaged in a (quarrel) (fray) (disorder) among persons subject to military law, and having been ordered into (arrest) (confinement) by —, did, at —, on or about —, 19—, [(refuse to obey) (draw a weapon, to wit a — upon) the said —] [threaten the said — by (saying to him (her) —, or words to that effect) (—)] [do violence to the said —, by —].

Offenses against persons suppressing quarrel, etc.

A. W. 69

38. In that —, having been duly placed in (arrest at —) (confinement in —) on or about —, 19—, did, at — on or about —, 19—, (break his said arrest) (escape from said confinement) before he was set at liberty by proper authority.

Breaking arrest; escape from confinement.

A. W. 70

39. In that —, being then charged with the duty of investigating charges preferred against —, a person subject to military law, who had been placed in (arrest) (confinement), was at —, on or about —, 19—, responsible for unnecessary delay in investigating said charges, in that he (did —) (failed to —).

Delay in investigating or disposing of a case.

A. W. 71

40. In that —, being on duty as (provost marshal) (commander of the guard) at — on or about —, 19—, did refuse to (receive) (keep) one —, a prisoner duly committed to his charge by —, an officer belonging to the forces of the United States who, at the time of committing said prisoner, delivered to the said — an account in writing, signed by himself, of the (crime) (offense) charged against said prisoner.

Refusal to receive or keep prisoner.

Failure to
prevent punishment
of prisoner.

41. In that ——— (having been) (being), on duty as commander of the guard at ———, did, on or about ———, 19—, fail to report in writing to the commanding officer of that (post) (——) (as soon as relieved from his guard) (within 24 hours after the confinement of said prisoner) the name of ———, a prisoner committed to his charge, the offense charged against him and the name of the officer committing him.

A. W. 73

Releasing
prisoner without
authority; suffering
prisoner
to escape.

42. In that ——— did, at ——— on or about ———, 19—, [without proper authority release] [through (neglect) (design) suffer] ———, a prisoner duly committed to his charge (to escape).

A. W. 74

Refusal to deliver
offenders to
civil authorities.

43. In that ———, being at the time the commanding officer at ———, and an application having been duly made to him by the ——— of ——— for the (delivery) (apprehension and securing) of ———, a (soldier) (officer) under his command, who was accused of a (crime) (offense) committed against the laws of ———, in order that the said ——— might be brought to trial did, at ———, on or about ———, 19—, (refuse) (willfully neglect) to (deliver said ——— to said ——— of ———) (aid the said ——— of ——— in apprehending and securing the said ———).

A. W. 75

Misbehavior
before the
enemy.

44. In that ——— did, at ———, on or about ———, 19—, misbehave himself before the enemy, (by refusing) (failing) to advance with his command, which had then been ordered forward by ——— to engage with ———, which forces, the said command was then opposing (——).

45. In that ——— did, at ———, on or about ———, 19—, run away from his (company) (——), which was then engaged with the enemy, and did not return thereto until (after the engagement had been concluded) (——).

46. In that ———, being present with his ——— while it was engaged with the enemy, did at ———, on or about ———, 19—, shamefully abandon the said ——— and (seek safety in the rear) (——), and did fail to rejoin it until (the engagement was concluded) (——).

47. In that ——— did, at ———, on or about ———, 19—, while before the enemy, shamefully (deliver up) (abandon) to the enemy ———, which it was his duty to defend.

48. In that ——— did, at ———, on or about ———, 19—, while before the enemy, by his (misconduct) (disobedience) (neglect) endanger the safety of ———, which it was his duty to defend, in that he (——) (——) (failed and neglected to post a sufficient number of sentinels).

49. In that ——— did, at ———, on or about ———, 19—, while before the enemy, speak words inducing ((the officers) (the

soldiers) (the officers and soldiers) of ——— [———] (to misbehave themselves before the enemy) (to run away from ———, which was then before the enemy) (shamefully to abandon their command, which was then engaged with the enemy) (shamefully to deliver up to the enemy, ———, which it was their duty to defend), to wit ——— or words to that effect.

50. In that ——— did, at ———, on or about ———, 19—, while before the enemy speak words inducing ——— who was then on outpost duty, (shamefully to abandon his post) (———), to wit ——— or words to that effect.

51. In that ———, while before the enemy, did at ———, on or about ———, 19—, unlawfully cast away his (rifle) (ammunition) (———).

52. In that ——— did, while before the enemy, quit his (post) (colors) at ———, on or about ———, 19—, for the purpose of (plundering) (pillaging) (plundering and pillaging) (———).

53. In that ——— did, while on duty before the enemy, occasion a false alarm in the (camp) (garrison) (quarters) (———) at ———, on or about ———, 19—, by (needlessly and without authority causing the call to arms to be sounded) (———).

A. W. 76

54. In that ——— did, at ———, on or about ———, 19—, (compel) (attempt to compel) ———, the commanding officer of ———, (to give it up to the enemy) (to abandon said ———), by ———.

Compelling
surrender, etc.

A. W. 77

55. In that ——— did, at ———, on or about ———, 19—, make known the (parole) (countersign) to wit, ———, to ———, a person who, according to the rules and discipline of war, was not entitled to receive it.

Making known,
etc., parole or
countersign.

56. In that ———, having received as the proper (parole) (countersign) the word ———, did at ———, on or about ———, 19—, give to ———, a person to whom he knew it was his duty to give the proper (parole) (countersign), a (parole) (countersign) different from that which he had received, to wit ———.

A. W. 78

57. In that ——— did, at ———, on or about ———, 19—, force a safeguard, known by him to have been placed over the premises occupied by ———, at ———, by (overwhelming the guard posted for the protection of the same) (———).

Forcing
safeguard.

A. W. 79

58. In that ——— did, at ———, on or about ———, 19—, neglect to secure the following public property of the United States, which had been taken from the enemy, viz, ——— of the value of about \$——— and ——— of the value of about \$———.

Neglect to
secure captured
property.

59. In that ——— did, at ———, on or about ———, 19—, wrongfully appropriate to (his own use) (———) the following

A. W. 50

60. In that ——— did, at ———, on or about ———, 19—, unlawfully (buy) (sell) (trade in) (deal in) (dispose of) the following (captured) (abandoned) property of the United States, namely: ——— of the value of about \$—— and ——— of the value of about \$——, thereby (receiving) (expecting) as (profit) (benefit) (advantage) (profit, benefit and advantage) to (himself) ———, his (brother) ———, (the sum of ———) (—— of the value ———).

61. In that ——— did, at ———, on or about ———, 19—, fail to give notice of and to turn over without delay to proper authority the following (captured) (abandoned) property of the United States, which had come into his (possession) (custody) (control), namely: ——— of the value of about \$—— and ——— of the value of about \$——.

A. W. 51

62. In that ——— did, at ———, on or about ———, 19—, (relieve) (attempt to relieve) the enemy with (arms) (ammunition) (supplies) (money) (——), by furnishing and delivering to certain members of the enemy's army ———, of the value of about \$——, and ———, of the value of about \$——.

63. In that ——— did, at ———, on or about ———, 19—, knowingly (harbor) (protect) (harbor and protect) ———, a person whom he, the said ———, then knew to be a member of the enemy's forces (and who was then being sought by a patrol of the United States forces), by (concealing the said member of the enemy's forces in his house) (——).

64. In that ——— did, at ———, on or about ———, 19—, knowingly give intelligence to the enemy, (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (by ———).

65. In that ——— did, at ———, on or about ———, 19—, knowingly (hold correspondence with) (give intelligence to) (hold correspondence with and give intelligence to) the enemy [(directly by writing and transmitting secretly through the lines to one ———, whom he, the said ———, then knew to be an (officer) (——) of the enemy's army, a communication (in words and figures as follows) (substantially as follows)) (or directly by publishing in ———, a newspaper published at ——— a communication in words and figures as follows) (substantially as follows)], to wit: ———, and which communication was intended to reach the enemy.

A. W. 52

66. In that ——— did, at ———, on or about ———, 19—, (assist) (aid) (assist and aid) (assist and aid) as a ——— in and about ———, the (fortification) (works) (quarters) (installations) of the Army of the United States, then located at ———.

the purpose of (collecting) (attempting to collect) material information in regard to the (numbers) (resources) (operations) (——) of the military forces of the United States, with intent to impart the same to the enemy

A. W. 83

67 In that —— did, at ——, on or about ——, 19——, (willfully) (through neglect) suffer ——, of the value of \$——, military property belonging to the United States, to be (lost) (spoiled by ——) (damaged by ——) [wrongfully disposed of by (sale to ——) (——)].

Suffering military property to be lost, etc.

A. W. 84

68. In that —— did, at ——, on or about ——, 19——, (unlawfully sell to ——) (wrongfully dispose of by ——) —— of the value of \$——, issued for use in the military service of the United States

Disposing of military property.

69. In that —— did, at ——, on or about ——, 19——, (willfully) (through neglect) (injure by ——) (lose) ——, of the value of \$——, issued for use in the military service of the United States.

Injuring or losing military property.

A. W. 85

70 In that —— was, at ——, on or about ——, 19——, found drunk while on duty as ——.

Drunk on duty.

A. W. 86

71 In that ——, being on guard and posted as a sentinel, at ——, on or about ——, 19——, was found (drunk) (sleeping) upon his post

Sentinel drunk or asleep.

72. In that ——, being on guard and posted as a sentinel at ——, on or about ——, 19——, did leave his post before he was regularly relieved.

Sentinel leaving post.

A. W. 87

73 In that ——, who was then commanding in ——, where troops of the United States were serving, did, on or about ——, 19——, for his private advantage, lay a (duty) (imposition) (duty and imposition) of (—— per cent) (——) upon the sales of (victuals) (certain necessaries of life, to wit, ——) brought into said ——, for the use of the troops thereat

Taxing, etc., provisions.

74. In that ——, who was then commanding ——, where troops of the United States were serving, did, on or about ——, 19——, for his private advantage, become interested in the sale of (victuals) (certain necessaries of life, to wit ——) (——). brought into said —— for the use of the troops thereat by ——, by (receiving) (entering into an agreement to receive) from the said —— (— per cent of the profits on said sales) (the sum of \$——) as a consideration for the privilege (of ——) extended by him to said ——.

Interest in sale of provisions.

A. W. 88

Intimidation
of persons bring-
ing provisions.

75. In that ——— did, at ———, on or about ———, 19—, unlawfully (abuse) (intimidate) (do violence to) (and wrongfully interfere with) ———, a person bringing (provisions) (supplies) (certain necessities) to wit ———, to the (camp) (garrison) (quarters) of the forces of the United States at ——— by [striking and beating the said ———] [threatening to kill the said ——— if he continued to bring such (provisions) (supplies) (necessaries) into said camp (garrison) (quarters)] [———] [preventing the said ——— from passing over a road leading into said ———] [———].

A. W. 89

Waste, spoil,
damage, riot,
etc.

76. In that ———, being with ———, (in the (quarters) (garrison) (camp) at ———) (while on the march from ——— to ———) did, at ———, on or about ———, 19—, without having been ordered by his commanding officer so to do commit (waste) (spoil) upon the property of ———, by ———.

77. In that ———, being with ——— (in the (quarters) (garrison) (camp) at ———) (while on the march from ——— to ———) did, at ———, on or about ———, 19—, willfully and unlawfully, and without having been ordered by his commanding officer so to do, destroy ——— the property of ——— of the value of ———.

78. In that ———, being with ———, [in the (quarters) (garrison) (camp) at ———] (while on the march from ——— to ———) did, at ———, on or about ———, 19—, commit a depredation upon (an) (a) (orchard) (———) belonging to ———, and situated at or near ———, by unlawfully (entering the same and removing growing fruit from the trees of said orchard) (———).

79. In that ———, ——— and ———, being with ———, [in the (quarters) (garrison) (camp) at ———] (while on the march from ——— to ———) did, at ———, on or about ———, 19—, commit a riot, in that they, together with certain other (soldiers) (persons) to the number of ———, whose names are unknown, did, (with force and arms) unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of ———, and having so assembled, did (unlawfully, riotously, and in a violent and tumultuous manner disturb, enter, and break up ———) (unlawfully and riotously assault ——— by ———), to the terror and disturbance of ———.

Refusing
reparation.

80. In that ———, who was then the commanding officer of ———, at ———, did, on or about ———, 19—, complaint having been made to him that (damage had been done to ———, the property of ———) (———, the property of ———, had been taken by) (———, a ———) (——— soldiers) of his command, (a) person(s) subject to military law, ———, (refuse) (omit) to see reparation made to the said ——— so far as said ———'s pay would go toward such reparation and as provided for in the 106th Article of War, by ———.

A. W. 90

81. In that ——— did at ———, on or about ———, 19—, wrongfully use a (reproachful) (provoking) (reproachful and provoking) (speech, to wit: ——— or words to that effect against) (gesture to ———) (by shaking his closed fist in the face of the said ———) (———). Provoking speeches, etc.

A. W. 91

82. In that ——— (and ———) did at ———, on or about ———, 19—, fight a duel, (with ———) using as weapons therefor, (swords) (pistols) (———). Duelling, etc.

83. In that ——— did, at ———, on or about ———, 19—, promote a duel between ——— and ——— by knowingly acting as a messenger for ——— and knowingly carrying from said ——— to said ——— a challenge to fight a duel.

84. In that ———, being officer of the day at ——— and having knowledge that ——— and ——— intended and were about to engage in a duel near that ———, did on or about ———, 19—, connive at the fighting of said duel by knowingly permitting ———, one of the parties to said proposed duel to leave the post and go toward the place appointed for said duel and at the time and at the hour which he, ———, then knew had been appointed therefor.

85. In that ———, being officer of the day at ———, and having knowledge on or about ———, 19—, that a challenge to fight a duel (had been sent) (was about to be sent) by ——— to ———, did fail to report that fact promptly to the proper authority.

A. W. 92

86. In that ——— did, at ———, on or about ———, 19—, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one ———, a human being by (shooting him with a rifle) (———). Murder.

87. In that ——— did, at ———, on or about ———, 19—, forcibly and feloniously, against her will, have carnal knowledge of ———. Rape.

A. W. 93

88. In that ——— did, at ———, on or about ———, 19—, willfully, feloniously, and unlawfully kill ———, by ——— him (in) (on) the ——— with a ———. Manslaughter.

89. In that ——— did, at ———, on or about ———, 19—, unlawfully, willfully, and feloniously cut off the (hand) (arm) (———) of ———. Mayhem.

90. In that ——— did, at ———, on or about ———, 19—, willfully, maliciously, unlawfully and feloniously burn the (dwelling house) (a building, to wit: a ———, parcel of the dwelling house) of ———. Arson.

91. In that ——— did, at ———, on or about ———, 19—, in the nighttime feloniously and burglariously break and enter the (dwelling house) (——— within the curtilage) of ———, with intent to commit a felony, viz (larceny) (rape) (murder) (———) therein. Burglary.

- Housebreaking.** 92. In that — did, at —, on or about —, 19—, unlawfully enter the (dwelling) (bank) (store) (warehouse) (shop) (stable) (—) of —, with intent to commit a criminal offense, to wit, — therein.
- Robbery.** 93. In that — did, at —, on or about —, 19—, by force and violence and by putting him in fear, feloniously take, steal and carry away from the (person) (presence) of —, —, the property of —, value about \$—.
- Larceny.** 94. In that — did, at —, on or about —, 19—, feloniously take, steal, and carry away —, value about \$—, the property of —.
- Embezzlement.** 95. In that — did, at —, on or about —, 19—, feloniously embezzle by fraudulently converting to his own use —, of the value of \$—, the property of —, entrusted to him (by the said —) (for — by —).
- Perjury.** 96. In that —, having taken an oath in a (trial by — court-martial of —) (deposition for use in a trial by — court-martial of —) (—), before —, a competent (tribunal) (officer) (person) that he would (testify) (depose) truly, did at —, on or about —, 19—, willfully, corruptly, and contrary to such oath, (testify) (depose) in substance that — which (testimony) (deposition) was a material matter and which he did not then believe to be true.
- Forgery.** 97. In that — did, at —, on or about —, 19—, with intent to defraud [falsely make in its entirety a certain (check) (—) in the following words and figures, to wit: —] [falsely alter a certain (check) (—) in the following words and figures, to wit: — by —] which said (check) (—) was a writing of a (public) (private) nature, which might operate to the prejudice of another.
- Sodomy.** 98. In that — did, at —, on or about —, 19—, commit the crime of sodomy by feloniously and against the order of nature having carnal connection (per os) (per anum) with (—) (a mare, the same being a beast) (—).
- Assault with intent to commit a felony or to do bodily harm.** 99. In that — did, at —, on or about —, 19—, with intent to (commit a felony, viz, —) (do him bodily harm), commit an assault upon —, by willfully and feloniously (striking) (—) the said — (in) (on) the — with a —
- Assault with intent to do bodily harm with a dangerous weapon.** 100. In that — did, at —, on or about —, 19—, with intent to do him bodily harm, commit an assault upon —, by (shooting) (striking) (cutting) (—) him (in) (on) the —, with a dangerous (weapon) (instrument) (thing) to wit, a (pistol) (pickax) (bayonet) (—).

A. W. 34

Making, etc., false claim.

101. In that — did, at —, on or about —, 19—, (make) (cause to be made by —) a claim against the (United States by presenting to —), [(finance officer at —) (—)] an officer of the United States, duly authorized to (approve) (allow) (pay) (approve, allow, and pay) such claims, in the amount of \$— for (private property alleged to have been (lost) (destroyed) in the military service) (—), which

claim was (false) (fraudulent) (false and fraudulent) in that —, and was then known by said — to be (false) (fraudulent) (false and fraudulent).

102. In that — did, at —, on or about —, 19—, (present) (cause to be presented by —) for (approval) (payment) (approval and payment) a claim against the [United States by (presenting) (causing to be presented) to —], [(finance officer at —) (—) an officer of the United States, duly authorized to (approve) (pay) (approve and pay)] such claims, in the amount of \$—, for (services alleged to have been rendered to the United States by —) (—), which claim was (false) (fraudulent) (false and fraudulent) in that —, and was then known by the said — to be (false) (fraudulent) (false and fraudulent).

Presenting, etc.,
false claim.

103. In that — did, at —, on or about —, 19—, (conspire) (agree) (agree and conspire) with —, to defraud the United States by (obtaining) (aiding — to obtain) the (allowance) (payment) (allowance and payment) of a (false) (fraudulent) (false and fraudulent) claim against the United States in the amount of \$—, for (supplies) (—) alleged to have been furnished to the United States by —, which claim was (false) (fraudulent) (false and fraudulent) in that —, and was then known by the said — to be (false) (fraudulent) (false and fraudulent).

Conspiracy, etc.,
to defraud
United States.

104. In that —, for the purpose of (obtaining) (aiding others, viz, —, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States, by presenting to —] [(finance officer at —) (—), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims] did, at —, on or about —, 19—, (make) (use) (make and use) [(procure) (advise) the (making) (using) (making and using) of] a certain (writing) (paper) to wit: —, which said —, as he, the said —, then knew contained a statement that —, which statement was (false) (fraudulent) (false and fraudulent) in that —, and was then known by the said — to be (false) (fraudulent) (false and fraudulent).

Making, etc.,
false writing.

105. In that —, for the purpose of (obtaining) (aiding others, viz, —, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States, by presenting to —] [(finance officer at —) (—), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims] did, at —, on or about —, 19—, (make) [(procure) (advise) (advise and procure) the making of] an oath (by —) (to the fact that —) (to a certain (writing) (paper) to wit, —, to the effect that —) which said oath was false in that —, and was then known by the said — to be false.

Making, etc.,
false oath.

106. In that —, for the purpose of (obtaining) (aiding others, viz, —, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against

Forging, etc.,
signature.

the [United States, by presenting to ———] [(finance officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims] did, at ——— on or about ———, 19—, (forge) (counterfeit) (forge and counterfeit) [(procure) (advise) (procure and advise) the (forging) (counterfeiting) (forging and counterfeiting) of] the signature of ———, upon a ———, (———) [by ———] in words and figures as follows: ———

Using, etc.,
forged signa-
ture.

107. In that ———, for the purpose of (obtaining) (aiding others, viz, ———, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States, by presenting to ———] [(finance officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims] did, at ———, on or about ———, 19—, (use) (advise the use of) (procure the use of) the signature of ——— on a certain (writing) (paper) to wit, ——— such signature, being (forged) (counterfeited) (forged and counterfeited), and then known by the said ——— to be (forged) (counterfeited) (forged and counterfeited)

Paying amount
less than receipt
calls for.

108. In that ———, having (charge) (possession) (custody) (control) of (money) (———) of the United States, (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about ———, 19—, knowingly (deliver) (cause to be delivered) to ———, the said ———, having authority to receive the same, (an amount) which as he, ———, then knew was (——— dollars ——— cents) (———) less than the (amount) for which he received a (certificate) (receipt), from the said ———.

Making receipt
without knowl-
edge of the
facts.

109. In that ———, being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about ———, 19—, (make) (deliver) (make and deliver) to ——— a writing in words and figures as follows: ———, without having full knowledge of the truth of the statements therein contained and with the intent to defraud the United States.

Larceny of mil-
itary property.

110. In that ——— did, at ——— on or about ———, 19—, feloniously take, steal, and carry away ——— of the value of about \$——, property, of the United States (furnished) (intended) (furnished and intended) for the military service thereof.

Embezzlement
of military
property.

111. In that ———, being at the time ———, did, at ———, on ———, 19—, feloniously embezzle by fraudulently converting to his own use ——— of the value of ———, the property of the United States (furnished) (intended) (furnished and intended) for the military service thereof, intrusted to him the said ——— by ———.

Misappropriation,
etc., of
military
property.

112. In that ——— did, at ———, on or about ———, 19—, (knowingly and willfully misappropriate) (knowingly and willfully apply to his own use) (knowingly and willfully apply to his own benefit) (knowingly and willfully apply to his own use and benefit) [(wrongfully) (knowingly and without proper authority) (wrongfully and knowingly) (sell) (dispose of by ———)] ——— of the value of about \$——, property

of the United States (furnished) (intended) (furnished and intended) for the military service thereof.

113. In that — did, at —, on or about —, 19—, knowingly (purchase) (receive in pledge for an (obligation) (indebtedness) from —, (in) (employed in) the military service) (forces) of the United States, (—) of the value of about \$—, property of the United States, the said — not having the lawful right to (sell) (pledge) the same.

Purchasing,
etc., United
States property.

A. W. 95

114. In that — did, at —, on or about —, 19—, [with intent to defraud] [with intent to (deceive) (injure) (deceive and injure)] wrongfully and unlawfully make and utter to —, a certain check, in words and figures as follows, to wit: —, [and by means thereof, did fraudulently obtain from — (\$—) (—) of the value of about (\$—)] [in payment of —], he the said —, then well knowing that he did not have and not intending that he should have (any account with) (sufficient funds in) the — bank for the payment of said check.

Making check
with insufficient
funds.

115. In that — was, at —, on or about —, 19—, in a public place, to wit, (—) (drunk) (disorderly) (drunk and disorderly) while in uniform.

Drunk, etc.

116. In that —, having assigned to — his claim (against the United States) for pay in full for the month of —, 19—, did, at —, on or about —, 19—, again assign to — said claim (or for the use of) against the United States for pay in full for the said month of —, 19—, which second assignment was by him known to be false and fraudulent.

Making false
assignment of
claim for pay.

117. In that —, being indebted to — in the sum of \$— for —, which amount became due and payable (on) (about) (on or about) —, did, at —, from —, 19—, to — 19—, dishonorably fail and neglect to pay said debt.

Failure, etc., to
pay debt.

118. In that —, having on or about —, 19—, become indebted to — in the sum of — for —, and having failed without due cause to liquidate said indebtedness, and having on or about —, 19—, promised (in writing to) said — that he would on or about —, 19—, (settle such indebtedness in full) (pay on such indebtedness the sum of \$—), did, without due cause, at —, on or about —, 19—, dishonorably fail to keep said promise.

Failure to keep
promise to pay
debt.

119. In that — did, at —, on or about —, 19—, with intent to deceive —, officially (report) (state) to the said —, that —, which (report) (statement) was (known by the said — to be untrue) (believed by the said — to be untrue) (made by the said — with disregard of a knowledge of the facts) (made by the said — as true when he did not know it to be true) in that —.

Making false
official state-
ment.

120. In that —, with intent to defraud —, did, at —, on or about —, 19—, unlawfully pretend to — that —, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said — (the sum of \$—) (merchandise of the value of \$—) (—).

False pretenses.

A. W. 96

Abusing animals.

121. In that — did, at —, on or about —, 19—, wrongfully (kick a public horse in the belly) (—).

Allowing prisoner to do unauthorized act.

122. In that —, a (sentinel) (overseer) (—), being in charge of prisoners, did, at —, on or about —, 19—, wrongfully allow —, a prisoner under his charge [to (go to) (enter) (go to and enter) an unauthorized place, to wit: —] [to (hold unauthorized conversation with —) (loiter) (neglect his task by —) (obtain) (receive) intoxicating liquor (—)].

Appearing in civilian clothing without authority. Improper or unclean uniform, etc.

123. In that — did, at —, on or about —, 19—, without authority, appear in civilian clothing.

124. In that — did, at —, on or about —, 19—, wrongfully appear (at) (on) — (without his —) (with his — not buttoned) (in an unclean —) (with an unclean —) (—).

Assault.

125. In that — did, at —, on or about —, 19—, wrongfully attempt to (strike) (—) (in) (on) the — with —.

Assault and battery.

126. In that — did, at —, on or about —, 19—, wrongfully (strike) (—) (in) (on) the — with —.

Malingering.

127. In that — did, at — (on or about —, 19—), (between — and —), with the intention of evading his (duty) (—) as a (soldier) (—), feign (illness), (disability), (insanity), (—).

Attempting to escape.

128. In that —, a prisoner lawfully in confinement in (the post guardhouse) (—), did at —, on or about —, 19—, attempt to escape from such confinement.

Breach of restriction.

129. In that —, having been restricted to the limits of —, did, at —, on or about —, 19—, break said restriction by going to —.

Carrying concealed weapon.

130. In that — did, at —, on or about —, 19—, unlawfully carry a concealed weapon, viz, a —.

Committing nuisance.

131. In that — did, at —, on or about —, 19—, wrongfully (urinate) (defecate) (—) (on the floor of the squad room) (—).

Mutilating, etc., public record.

132. In that — did, at —, on or about —, 19—, willfully and unlawfully [(conceal) (remove) (mutilate) (obliterate) (destroy)] [attempt to (conceal) (remove) (mutilate) (obliterate) (destroy)] [take and carry away with intent to (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: (the descriptive list of —) (—).

Conspiracy to escape.

133. In that —, a prisoner lawfully in confinement in (the post guardhouse) (—), did at —, on or about —, 19—, conspire with — and — to escape from such confinement.

Destruction of Government property.

134. In that — did, at —, on or about —, 19—, willfully, wrongfully, and unlawfully destroy —, value about \$—, property of the United States.

Careless discharge of firearm.

135. In that — did, at —, on or about —, 19—, through carelessness, discharge a (service rifle) (—) in his (squad room) (tent) (—).

136. In that — was at — on or about —, 19— [(drunk) (disorderly) (drunk and disorderly) in (command) (quarters) (station) (camp) (—)] [(drunk) (disorderly) (drunk and disorderly) (in uniform in a public place, to wit —) (—)]. **Drunkenness, etc.**
137. In that —, a sentinel (—) in charge of prisoners, did, at —, on or about —, 19—, drink intoxicating liquor with —, a prisoner under his charge. **Drinking liquor with prisoner.**
138. In that —, a prisoner, was, at —, on or about —, 19—, found drunk. **Prisoner found drunk.**
139. In that —, having received a lawful order from — to —, the said — being in the execution of his office, did, at —, on or about —, 19—, fail to obey the same. **Failing to obey order.**
140. In that —, being indebted to — in the sum of \$ — for —, which amount became due and payable (on) (about) (on or about) —, did, at —, from —, 19—, to —, 19—, dishonorably fail and neglect to pay said debt. **Failure to pay debts, etc.**
141. In that — did, at —, on or about —, 19—, with intent to deceive —, officially (report) (state) to the said —, that —, which (report) (statement) was (known by the said — to be untrue) (believed by the said — to be untrue) (made by the said — with disregard of a knowledge of the facts) (made by the said — as true when he did not know it to be true) in that —. **False official report.**
142. In that — did, at —, on or about —, 19—, (in an affidavit) (in his testimony before a — court-martial at the trial of —) (in —) make under oath a statement in substance as follows: (—) which statement he did not then believe to be true. **False swearing.**
143. In that (Sergeant) (Corporal) — did, at —, on or about —, 19—, gamble with Privates — and —. **Gambling with subordinate.**
144. In that — did, at —, on or about —, 19—, gamble in quarters, in violation of (here insert description of order). **Gambling in quarters in violation of orders.**
145. In that — did, at —, on or about —, 19—, while (at a barracks window) (—) willfully and wrongfully expose in an indecent manner to public view his (—). **Indecent exposure.**
146. In that — did, at —, on or about —, 19—, wrongfully introduce (for sale) into (quarters) (station) (camp) (—) (two quarts of whisky) (one ounce of heroin) (—). **Introduction of liquor, drugs into command.**
147. In that — did, at —, on or about —, 19—, wrongfully use —, a narcotic drug. **Using a drug.**
148. In that — did, at —, on or about —, 19—, have in his possession — ounces, more or less, of a habit-forming drug, to wit (—), said drug not having been ordered by a medical officer of the Army. **Possession of drug.**
149. In that — (for and in behalf of one —) did, at —, on or about —, 19—, loan to — \$ —, under an agreement whereby he, the said —, was to receive for the use of said money for — (months) (days) interest at the rate of — per cent per (annum) (month) (the sum of \$ —), thereby (demanding) (receiving) (demanding and receiving) an usurious rate of interest for said loan. **Usury.**

False pretenses.

150. In that —, with intent to defraud —, did at —, on or about —, 19—, unlawfully pretend to — that —, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said — (the sum of \$—) (merchandise of the value of \$—) (—).

Failure to take prophylaxis.

151. In that —, did, at —, on or about the —, 19—, neglect to take proper prophylactic treatment after illicit sexual intercourse and did thereby develop a venereal disease, to wit (—).

Offenses against and by sentinel.

152. In that — did, at —, on or about —, 19— (attempt) (threaten) to (strike) (assault) —, a sentinel in the execution of his duty [(in) (on) the —] with (a) (his) —.

153. In that — (a prisoner) did, at —, on or about —, 19— [use the following (threatening) (insulting) (threatening and insulting) language] [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward —, a sentinel in the execution of his duty ["—," or words to that effect] [by — —].

154. In that —, having received a lawful order from —, a sentinel in the execution of his duty, to —, did, at —, on or about —, 19— (fail to obey) (willfully disobey) the same.

155. In that — did, at —, on or about —, 19— (strike) (assault) —, a sentinel in the execution of his duty, (in) (on) the — with (a) (his) —.

156. In that —, while posted as a sentinel, did, at —, on or about —, 19—, loiter (wrongfully sit down) on his post.

Straggling.

157. In that — did, at —, on or about —, 19—, while accompanying his organization on (a practice march) (maneuvers) without just cause straggle.

Subornation of perjury.

158. In that — did, at —, on or about —, 19—, procure — to commit perjury, by inducing him, the said —, to take an oath before a competent (tribunal) (officer) (person) in a (trial by court-martial of —) (—) that he, the said —, would (testify) (depose) truly and, willfully, corruptly, and contrary to such oath, to (testify) (depose) in substance that — which (testimony) (deposition) was false, was (material) (a material matter) and was known by the said — and the said — to be false.

Breaking parole.

159. In that —, a prisoner on parole, did, at —, on or about —, 19—, break his parole by —.

Receiving stolen goods.

160. In that — did, at —, on or about — feloniously receive, have, and conceal (describe property as in larceny), of the goods and chattels of (name owner), then lately before feloniously stolen, taken, and carried away; he, the said (accused), then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

Uttering forged instrument.

161. In that — did, at —, on or about —, 19—, with intent to defraud willfully, unlawfully, and feloniously (pass) (utter) (publish) (attempt to (pass) (utter) (publish)) as true and genuine a certain — in words and figures as follows: —, a writing of a (public) (private) nature, which

might operate to the prejudice of another, which said ——— was, as he, the said ——— then well knew, falsely (made) (altered) and forged.

162. In that ——— did, at ———, on or about ———, 19—, willfully maim himself in the ——— by (shooting himself with ———) (———), thereby unfitting himself for the full performance of military service.

Self maiming.

163. In that ——— did, at ———, on or about the ———, 19—, with intent to (maim) (disfigure) (maim and disfigure), willfully, unlawfully, and feloniously [(cut) (bite) (slit) the (nose) (ear) (lip)] [(cut out) (disable) the tongue] [(put out) (destroy) the eye] [(cut off) (disable) the (limb) (——, the member)] of ——— by ———.

Maiming, etc.

164. In that ——— did, at ———, on or about ———, 19—, with intent to (maim) (disfigure) (maim and disfigure), willfully, unlawfully, and feloniously, (throw) (pour) upon ———, (scalding hot water) (vitriol) (——, a corrosive acid) (——, a caustic substance)

Disfiguring, etc., with vitriol, etc.

165. In that ——— did, at ———, on or about ———, 19—, in a claim for (family allowance) (compensation) (insurance) [In ———, a document required by (regulations made under) the war risk insurance act, in the making of a claim for (family allowance) (compensation) (insurance), to wit ———] willfully and unlawfully make a statement that ——— which statement was a material fact, and known by the said ——— to be false, in that ———.

Statutory perjury.

166. In that ——— did, at ———, on or about ———, 19—, by willfully concealing the fact that he was then a private in ———, procure himself to be enlisted in the military service of the United States by ———

Fraudulent enlistment.

167. In that ——— did, at ———, on or about ———, 19—, maliciously (set fire to) (burn) (attempt to burn) [(destroy) (injure) by ———] [attempt to (destroy) (injure)] (a) (an) ——— (arsenal, armory, etc., as the case may be).

Burning, etc., of building.

APPENDIX 5

SUGGESTIONS FOR TRIAL JUDGE ADVOCATES

a. GENERAL AS TO DUTIES AND DUTIES OF ASSISTANT

See 41, 42, 97, 98, and 99.

An assistant trial judge advocate may, for example, assist the trial judge advocate in the preparation of cases for trial; try such cases as the trial judge advocate may, with the consent of the court, direct; take charge of the investigation before trial and proof during the trial of any particular phase or phases of the charges in any case; and relieve the trial judge advocate of minor details, such as arranging for a place of meeting of the court, stationery, messenger service, subpoenaing witnesses, etc.

b. PRIOR TO ASSEMBLING OF COURT

Prepare an envelope to contain the papers pertaining to each case, including copies of letters sent. A record may be conveniently kept on this envelope of such matters as date of receipt of charges or other papers; date of service of charges on accused; how accused intends to plead, name of individual counsel; result of examination in preparing for trial, and dates and other necessary facts pertaining to each other incident connected with the case, such as mailing interrogatories, subpoenaing witnesses, etc.; date and hours of each session of the court; date and hour commanding officer was notified of result of trial; date and hour record received back from reporter; date and hour record forwarded to appointing authority.

Examine the charges and all papers received to see that none appear to be missing; make and initial any authorized necessary changes in charges, and take proper action in connection with defects, if any, found in evidence of previous convictions, or in the data as to service, report to the appointing authority necessary or desirable changes which the trial judge advocate is not authorized to make.

Serve the accused with a copy of the charges, sign certificate on charge sheet of such service, and notify defense counsel.

Prepare case for trial; arrange with president date and time of meeting of court; arrange for court-martial room, see that it is in order, provided with necessary tables, chairs, stationery, etc.; notify all concerned of date and time of meeting, and arrange for presence of the accused, reporter, and interpreter.

c. DURING TRIAL

See form of record, App. 6

d. AFTER TRIAL

Notify commanding officer in writing, direct, of result of trial.

Complete vouchers for civilian witnesses and deliver same, if practicable, before the witnesses leave.

As to contents, preparation, authentication, and disposition of record and certain related matters, see 85, 86, and App. 6, and App 7.

Where documents received in evidence, etc., are to be returned and copies substituted (see 75a), see that such copies are correct, certify them, and return such documents. Occasion for this action frequently arises in connection with documentary evidence of previous convictions which is part of the records of an organization. Give defense opportunity to read record before it is authenticated. After record is authenticated take appropriate action with respect to delivery of copies thereof and make appropriate notations on index sheet.

Certify and make proper disposition of original voucher of reporter

APPENDIX 6

FORM FOR RECORD OF TRIAL BY GENERAL COURTS-MARTIAL, AND REVISION PROCEEDINGS, WITH NOTES

Record of Trial by General Court-Martial of Private ———, Company ———,
————— Infantry —————.

- Erasures.** (NOTE—The record will be clear and legible. Erasures or interlineations appearing on the record as authenticated will be initialed by those who authenticated the record. The pages of the record will be numbered at the bottom and margins of 2¼ inches will be left at the top, and 1 inch at the bottom and left side of each page.)
- Margins.**
- Marginal notes.** The words on the left margin of this appendix are not part of the form of record.
- Record of arguments.** Written arguments will be attached as exhibits, appropriate references being made to each in the record at the proper place. Oral arguments as to any question, interlocutory or other, need not be recorded except to the extent required or permitted by the court, and except to the extent necessary for a proper understanding of any objection made or question raised with respect to an argument. The proceedings and action on any such objection or question will be recorded. The fact that a party made or declined to make an argument will be recorded.
- Use of form.** This form is to be used as a general guide, and with the understanding that the actual record of many cases will depart from the form in numerous particulars.)

Index.	INDEX	Page
	Arraignment.....	
	Pleas.....	
	Statement by accused.....	
	Findings.....	
	Sentence (or acquittal).....	
	Proceedings in revision.....	

Witnesses.

TESTIMONY

Name of witness	Direct	Cross	Redirect	Recross	Court	Recalled
.....						
.....						
.....						
.....						
.....						

Exhibits.

EXHIBITS, ETC., APPENDED

Description	Number	Page where introduced
.....		
.....		
.....		
.....		

Copies of record.

- copies of record furnished as per attached certificates or receipts.
- copies of record forwarded herewith. (See 85b.)

Proceedings of a general court-martial which convened at ———, pursuant to the following order (or orders) :

(*NOTE*—Here insert a literal copy of the order appointing the court and following it, copies of any orders modifying the detail. Such copies may be prepared beforehand to be bound with the record.)

Orders.

Fort ———, ———, ———, 19—

Place, date and hour.

The court met pursuant to the foregoing order (or orders) at ——— o'clock ———

PRESENT

Personnel present.

(*NOTE*—List the personnel of the court who are present.)

Col ———, Fifth Cavalry.

Lieut. Col. ———, First Infantry.

Lieut. Col. ———, Third Field Artillery.

Maj ———, J A G D, law member.

Maj ———, Third Field Artillery.

Capt ———, Fourth Infantry

Capt ———, Fifth Cavalry

Capt ———, Fifth Cavalry, trial judge advocate

First Lieut. ———, Third Field Artillery, assistant trial judge advocate

Capt. ———, Fourth Infantry, defense counsel

Capt. ———, Fourth Infantry, assistant defense counsel.

ABSENT

(*NOTE*—The fact of, and any known reason for, the absence of any of the personnel of the court will be stated. If no reason is known, state "reason unknown" (See 38c)

Absentees and reason for absence.

Capt. ———, First Infantry (detached service).

Capt. ———, Third Field Artillery (reason unknown).

The court proceeded to the trial of Private ———, Company ———, ——— Infantry, who, on appearing before the Court, was asked by the trial judge advocate whom he desired to introduce as counsel. The accused (introduced as his individual counsel Capt. ———, Third Field Artillery, and as associate counsel the defense counsel and the assistant defense counsel) (stated that he desired to be defended by the defense counsel and the assistant defense counsel.) (———.)

Appearance of accused and introduction of counsel.

——— was sworn as reporter

Reporter sworn.

Prosecution to accused: Do you want a copy of the record?

Copy of record.

Accused: ———

——— was sworn as interpreter.

Interpreter sworn.

(*NOTE*—The interpreter may be sworn just before he functions as such.)

The trial judge advocate then announced the names of the members of the court present.

Names of members announced.

(*NOTE*—The trial judge advocate will here disclose in open court every ground of challenge believed by him to exist in the case, and the record will here show any such disclosure and the proceedings and action taken thereon. See 57.)

Excusing members.

Prosecution: If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member, it is requested that he state such facts.

(**NOTE.**—The trial judge advocate will give such information as to the general nature of the charges, who signed them, and who participated in the proceedings already had thereon as may be requested. See 57. The record will show any such request and the action taken thereon.)

Capt. ———, Fourth Infantry, announced that he signed the charges in the case. He was excused and withdrew.

Challenges by trial judge advocate.

Prosecution: The prosecution has no challenges.

(**NOTE.**—Or insert here any challenges made by the trial judge advocate and the action thereon. See 58, and form below as to challenge by accused.)

Opportunity to challenge given accused.

Prosecution to accused: You now have an opportunity to exercise your rights as to challenge.

(**NOTE.**—Upon request, the defense will here be given an opportunity to examine the orders, etc. See 58f. If defense does not desire to challenge, the record will so state.)

Challenge by accused.

Defense: ———.

(**NOTE.**—If challenge is made, insert the challenge and any statement made by the challenged member. See 58. If the defense withdraws the challenge, or if the challenged member is excused without closing, the record will so state. Should challenged member testify as to his competency, the record should continue.)

Challenged member sworn.

The challenged member was sworn as to his competency to act as a member of the court, and testified as follows:

(**NOTE.**—See 95. Where the challenge is contested the proceedings on the issue are recorded and, after showing both sides as resting on such issue, the record continues:)

Court votes on challenge; decision announced.

The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and, upon being opened, the president announced that the challenge was (sustained, and the challenged member thereupon withdrew) (or not sustained, and the challenged member thereupon resumed his seat).

Further challenges by accused.

The accused was asked if he objected to any other member present, to which he replied in the negative, or

Defense: ———.

(**NOTE.**—Show each successive challenge, etc., as above. After accused replies in the negative, the record—a quorum being present—continues:)

Court, etc., sworn.

The members of the court and the personnel of the prosecution were then sworn.

Nolle prosequi.

(**NOTE.**—A nolle prosequi may be entered either before or after arraignment and plea. See 72. The following form may be used:)

Prosecution: By direction of ———, the prosecution withdraws the following charges and specifications and will not pursue the same further at the present trial: ———.

Arraignment.

The accused was then arraigned upon the following charges and specifications: —

(**NOTE.**—Do not copy matter on charge sheet that precedes the charges proper.)

Charge I: Violation of the ——— Article of War.

Charges.

Specification: In that, etc

Charge II: Violation of the ——— Article of war.

Specification 1: In that, etc

Specification 2: In that, etc.

(NOTE—Copy name, etc., of accuser; the affidavit with name, etc., of person who administered oath, and the indorsement referring case for trial, with name, etc., of person signing such indorsement)

Signature, affidavit, indorsement.

(NOTE—If a continuance is desired, the application is usually made at this point (See 52) All proceedings thereon are recorded)

Continuance.

Defense: (If there are more than one accused, a motion or motions to sever may be made See 71b)

Motion to sever.

(NOTE—If made, the record shows the motion to sever and proceedings had thereon. If granted, the record should show the decision of the court as to which accused the trial is to proceed and the formal amendment of the charges See 71b. The record of such amendment might in a proper case read as follows:—)

President: Each specification is formally amended by striking out the words "and Private ———, Company ———, ——— Infantry," the accused who is not now to be tried, and the words "acting jointly and in pursuance of a common intent" and by inserting after the word "did" the words "acting in conjunction with Private ———, Co ———, ——— Infantry," the accused who is not now to be tried. Trial will proceed on the charges as amended.

Amendment after severance.

Defense. As to specification ——— charge ——— the defense now pleads former acquittal in that the accused herein was by a court-martial convened pursuant to paragraph ———, S O ———, headquarters ———, dated ———, duly tried upon a charge of ——— (reciting the charge and specification in full or in substance) and was on ——— (date) duly acquitted of such charge and specification; and the offense for which he was so tried and acquitted is the same as the offense set forth in specification ———, charge ———, to which this plea is made.

Special pleas; motion to strike out, etc.

(NOTE—In the case special pleas, motions, etc., are made, the record will show them and the proceedings and action thereon. See 64-69, 71-73. This form of record as to pleas assumes that pleas to the general issue are finally made. If the accused's right to plead the statute of limitations is explained to him, the fact that the explanation was made will be recorded. The terms of the explanation need not be recorded, but any response by the accused will be fully recorded.)

Law member: Subject to objection by any member of the court, the plea is overruled (or the plea is sustained, and the accused is not required further to plead to Specification ———, Charge ———).

President: There being no objection, the ruling stands.

The accused then pleaded as follows.

To the Specification, Charge I: Guilty (or not guilty).

To Charge I: Guilty (or not guilty).

To Specification 1, Charge II: Guilty (or not guilty).

To Specification 2, Charge II: Guilty (or not guilty).

Pleas to general issue.

To Charge II: Guilty (or not guilty).*or***To all charges and specifications, Guilty (or not guilty).****Explanation of plea of guilty.**

(NOTE.—If an explanation of a plea of guilty is made (see 70), the fact that the explanation was made will be recorded. The terms of the explanation need not be recorded, but any response by the accused will be fully recorded.)

Record of matters read to court by trial judge advocate.

By direction of the court the following matters were read to the court by the trial judge advocate, to wit:

(NOTE.—Any extracts from the manual or elsewhere that are read will be identified by paragraph, page, etc., but need not be copied in the record. See 75b.)

Opening statement.

The trial judge advocate then made an opening statement to the court.

(NOTE.—The trial judge advocate may make an opening statement. See 75b. This statement need not be recorded except to the extent required or permitted by the court and except to the extent necessary for a proper understanding of any objection made or question raised with respect to such statement. The proceedings and action on any such objection or question will be recorded.)

Witness sworn.

Sergt. John Jones, Company —, — Infantry, a witness for the prosecution, was sworn and testified as follows:

Caution if recalled.

(NOTE.—Each witness will be sworn. When a witness is recalled, the record should show that he was cautioned that he was still under oath. See 121a.)

Direct examination.**DIRECT EXAMINATION**

Questions by prosecution:

Q. Do you know the accused? If so, state his name.

A. I do; ————

Q. Is he in the military service of the United States?

A. ———.

Show accused subject to military law.

(NOTE.—If accused is not in the military service of the United States, show how he is otherwise subject to court martial jurisdiction.)

Q. What is his grade and organization?

A. ———.

Questions and answers fully set out.

(NOTE.—The succeeding questions and answers should follow in order. The record should set forth testimony in the words of the witness. If the court should decide to strike out any part of the testimony, it will not be literally stricken out or omitted from the record, but it will not be thereafter considered as part of the evidence. If questions and answers are through an interpreter, the record will so state.)

Questions and answers through interpreter.**Cross-examination.****CROSS-EXAMINATION**

(NOTE.—Accused will be given full opportunity to cross-examine each witness called or recalled by the prosecution or by the court.)

Questions by defense:

Q. ———?

A. ———.

(NOTE.—If the defense declines to cross-examine witness, the record should state:)

The defense declined to cross-examine the witness.

REDIRECT EXAMINATION

Redirect examination.

Questions by prosecution:

Q ———?

A. ———.

RE CROSS EXAMINATION

Recross examination.

Questions by defense:

Q ———?

A. ———.

Prosecution: (*Insert objection*)

Defense: (*Insert reply*)

(NOTE—As to arguments, see note at beginning of this appendix)

The law member: The objection is sustained (or not sustained)

Ruling.

(NOTE—(400 51) Where a question of admissibility of evidence is to be voted on by court—that is, when the ruling of the president on the question is objected to—the record shows the facts and continues')

The court was closed, and upon being opened the president announced that the objection was sustained (or that the objection was not sustained)

Where court is closed.

EXAMINATION BY THE COURT

Examination by court.

Questions by ———:

Q ———?

A. ———.

CROSS-EXAMINATION

Cross-examination by defense.

Questions by defense:

Q ———?

A. ———.

REDIRECT EXAMINATION

Redirect examination by prosecution.

Questions by prosecution:

Q ———?

A. ———.

Prosecution: I offer in evidence the ——— (describing the writing or other proposed exhibit, e. g., knife or pistol).

Introduction of exhibits.

(NOTE—The proper foundation for the introduction of a writing or other exhibit should be laid before offering the exhibit)

Defense: (*Insert any objection or other remark.*)

(NOTE—If the exhibit is received the record will continue.)

The paper (or other proposed exhibit) was then received in evidence (was read) and marked Exhibit ———.

Exhibit marked read in evidence.

(NOTE—See 75 with reference to marking and appending rejected documentary evidence)

Appending rejected document.

Prosecution. The prosecution rests

Prosecution rests.

(NOTE—If the court adjourns to meet another day, the record should continue')

Adjournment. The court then, at _____ o'clock —. m., on _____ 19—, adjourned to meet at _____ o'clock —. m., on _____ 19—.

_____,
Captain, 5th Cavalry,
Trial judge advocate.
 Fort _____, _____, 19—.

Accounting for personnel. The court met, pursuant to adjournment, at _____ o'clock —. m., all the personnel of the court, prosecution, and defense, who were present at the close of the previous session in this case, being present (except)

(*NOTE*—Account for absentees as before, except that no mention need be made of personnel not present at the close of the previous session.)

The accused and the reporter were also present

Capt. _____, Fourth Infantry, appeared as a member of the court pursuant to the following order:

(here insert a literal copy of such order)

New member. The trial judge advocate announced the name of the new member

(*NOTE*—The proceedings and record thereof with respect to examining, challenging, and swearing the new member are to be substantially as shown for original members. If the new member is sworn the record continues.)

The record of the proceedings of _____, 19—, in this case were then read to (or by) the new member.

Opening statement by defense. The defense counsel made an opening statement to the court.

(*NOTE*—See note above as to opening statement by trial judge advocate.)

Witness sworn. Corpl. John Smith, Company _____, _____ Infantry, a witness for the defense, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the defense:

Q. _____?

A. _____

(*NOTE*—Record any subsequent examinations of the witness following the principles already indicated above.)

Accused sworn. The accused, at his own request, was sworn and testified as follows:

DIRECT EXAMINATION

(*NOTE*—Follow as already indicated.)

or

Unsworn statement. The accused made an unsworn statement.

(*NOTE*—Any such statement will be inserted in full if oral or attached as an exhibit if written.)

Defense rests. Defense: The defense rests.

The defense having rested, the prosecution recalled Sergt. John Jones, Company —, — Infantry, who after being reminded that he was still under oath, testified as follows:

Rebuttal.

or

The prosecution announced that it had no further testimony to offer.

(NOTE—The defense will be asked if it has any further testimony to offer and, if not, the record will continue:)

The defense had no further testimony to offer (or having no further testimony to offer requested until — o'clock — m. to prepare his defense (or argument)).

(NOTE—If the court takes a recess, the record will continue:)

The court then took a recess until — o'clock — m., at which hour the personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats.

Recess.

Arguments were then made (submitted) as follows:

(NOTE—See note at beginning of this form and 77. The court should require an oral argument or a part thereof to be recorded when good reason exists, e. g., when accused makes an admission in his argument.)

Closing arguments.

Neither the prosecution nor the defense having anything further to offer, the court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty (if any), finds the accused.

Findings.

(NOTE—The finding on each of the several specifications and charges not previously disposed of as a result of a special plea, etc., will be shown in case of a finding of guilty of a specification charging an offense for which the death penalty is made mandatory by law, and the corresponding charge as to such specification, the record will show that all the members of the court present at the time the vote was taken concurred therein. See A W 43.)

Death penalty.

Of the specification, Charge I: Guilty (or not guilty).

Of Charge I: Guilty (or not guilty)

Of Specification 1, Charge II: Guilty, except the words "—," substituting therefor the words "—," of the excepted words Not guilty, and of the substituted words, Guilty

Of Specification 2, Charge II: Guilty (or not guilty)

Of Charge II: As to Specification 1: Not guilty, but guilty of a violation of the — A. W. As to Specification 2: Guilty (or not guilty).

or

Of all specifications and charges: Guilty (or not guilty).

(NOTE—If the accused is found not guilty upon all specifications and charges, the record will continue:)

The court was opened; the president announced that the accused was acquitted upon all specifications and charges

Acquittal.

(NOTE—If the accused is found guilty of any offense, the record should continue.)

The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions to submit.

Previous convictions.

	<p>Or, read the attached evidence of previous convictions (Exhibits — to —).</p>
Data as to service, etc.	<p>The trial judge advocate read the data as to age, pay, and service as shown on the charge sheet as follows (insert matter read) :</p> <p>(NOTE.—Where objection is made to evidence of previous conviction or to the data as to service, the proceedings had thereon will be recorded. See 79.)</p>
Sentence.	<p>The court was closed, and upon secret written ballot two-thirds (or three-fourths, or all) of the members present at the time the vote was taken concurring, sentences the accused to —.</p>
Reasons.	<p>(NOTE.—As to including reasons for findings and a statement of the weight given to evidence, see 78a. As to including reasons for sentence, see 80a.)</p>
Announcement of sentence.	<p>The court was opened and the president announced the findings and sentence,</p> <p style="text-align: center;">or</p> <p>The court was opened and the president stated that the court had directed that the findings and sentence be not announced.</p>
Matters as to clemency.	<p>Documents submitted by the defense for consideration in connection with clemency are attached hereto marked —</p> <p>The court then, at — — — — — m., on — — — — —, 19—, proceeded to other business.</p>
Adjournment.	<p>Or, adjourned until — — — — — m., the — — — — — instant.</p> <p>Or, adjourned to meet at the call of the president.</p>
Authentication.	<p style="text-align: right;">_____,</p> <p style="text-align: right;"><i>Colonel, 5th Cavalry, President.</i></p> <p style="text-align: right;">(or Lieutenant Colonel, 1st Infantry, a member in lieu of the president because of his (death) (disability) (absence).)</p> <p style="text-align: center;">_____ _____ _____</p> <p style="text-align: right;"><i>Captain, 5th Cavalry, Trial Judge Advocate.</i></p> <p style="text-align: right;">(or First Lieutenant, 3d Field Artillery, assistant trial judge advocate (because of (death) (disability) (absence) of trial judge advocate.)</p> <p style="text-align: right;">(or Major, 3d Field Artillery, a member in lieu of trial judge advocate and assistant trial judge advocate because of (death) (disability) (absence) of trial judge advocate, and of (death) (disability) (absence) of assistant trial judge advocate.)</p>
Certificate.	<p>(NOTE.—If the findings and sentence were not announced, the trial judge advocate or assistant trial judge advocate, or member, as the case may be, will certify immediately after the authentication of the record as follows :)</p>

I certify that I personally recorded the findings and sentence of the court _____.

(NOTE.—Exhibits follow in numerical order, then any rejected documents ordered appended, and then any recommendations and other papers relating to clemency.

Exhibits.

The papers forming the complete record will be securely bound together at the top)

Binding.

(NOTE.—Bulky exhibits such as a pistol will not ordinarily be attached to the record. Where advisable or necessary, a description or photograph of such an exhibit may be attached as an exhibit, an appropriate statement being made in the record.)

Bulky exhibits.

Fort _____,
_____, 19____.

Revision of record.

The court reconvened at _____ o'clock -- m., pursuant to the following indorsement

(NOTE.—Insert copy of indorsement.)

Indorsement reconvening court. Accounting for personnel.

All the members of the court, and the personnel of the prosecution who were present at the close of the previous session in this case were present (except)

(NOTE.—Account for personnel as before, no mention being made of those not present at the close of the previous session in the case. No member should sit in revision proceedings who was not present at the previous session in the case.)

(NOTE.—As to presence of accused and of the personnel of the defense, see 53. If present, the fact will be stated.)

The trial judge advocate read to the court the foregoing indorsement

Indorsement read.

The court was closed and revokes its former findings and sentence, and upon secret written ballot _____

When court revokes findings and sentence.

(NOTE.—Continue as before indicated with reference to the findings. If the new findings include a finding of guilt the record continues:)

The court upon secret written ballot _____.

(NOTE.—Continue as before indicated with reference to the sentence, announcement of findings and sentence, and adjournment or proceeding to other business.)

(NOTE.—If new findings do not include a finding of guilt, the record continues as before indicated for opening the court, announcing an acquittal, adjournment, etc.)

The court was closed and revokes its former sentence and upon secret written ballot _____.

Where court revokes sentence.

(NOTE.—Continue as before indicated with reference to the sentence, announcement of sentence, adjournment, etc.)

The court was closed and amended the record by (Inserting between lines _____ and _____, page _____, the words "The members of the court and the personnel of the prosecution were then sworn"). The court was opened and _____.

Where court amends record.

(NOTE.—Continue as before indicated with reference to adjournment or proceeding to other business.)

**Where court
adheres.**

The court was closed and respectfully adheres to its former findings (*or* sentence) (*or* findings and sentence).

(NOTE.—Continue as before indicated with reference to adjournment or proceeding to other business.)

Authentication.

(NOTE.—The record of revision proceedings is authenticated in accordance with the principles already indicated.)

Binding record.

(NOTE.—The record of revision will be bound in with the original record, before the exhibits.)

APPENDIX 7

FORM FOR RECORD OF TRIAL BY SPECIAL COURT-MARTIAL

Proceedings in the trial of Private _____, Company _____, _____ Infantry, by the special court-martial appointed by the orders of which copies are appended marked _____, _____, and _____

(NOTE—See 86 and note at head of App 6. No index is required and no copy of the record need be made.)

Fort _____, _____, 19—

The court met pursuant to the orders appointing it at _____ o'clock, _____, all the personnel of the court being present (except as follows:)

(NOTE—List absentees. Reasons for absence need not be shown.)

The accused and counsel introduced by him, viz, _____, _____, _____ were present. (_____ was sworn as reporter and _____ as interpreter.)

(NOTE—As to employment of reporter for a special court-martial, see 46a.)

The following members of the court were excused and withdrew for the reasons stated opposite their respective names

Capt. _____ (excused without challenge as being the accuser).

Lieut. _____ (excused upon challenge for cause).

Lieut. _____ (excused upon peremptory challenge).

There was no contest with respect to the excusing of any of the officers named (except as follows:)

(NOTE—Insert a summary of the entire proceedings had with respect to each contest.)

The accused having been given full opportunity to exercise his rights as to challenge, the members of the court and the personnel of the prosecution were sworn.

(NOTE.—Record continues as provided for a general court-martial up to arraignment.)

The accused was then arraigned upon the charges and specifications appended and marked _____.

(NOTE.—The record then continues as provided for a general court-martial, except that, if no reporter is employed, a summary only of the testimony and of any oral statements made on behalf of the defense need be recorded, and the data as to service, etc., need not be copied. Any ruling on an interlocutory question, the occasion for that ruling, and the final action on the question should show.)

APPENDIX 8

FORM FOR RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

The record is ordinarily placed on the original charge sheet as indicated below.

CASE No. ———

Specifications and charges	Plea	Findings	Sentence or acquittal, and remarks
Sp 1 Ch I . . .	N G or G	N G or G	(NOTE — If accused is found not guilty of all charges and specifications, record "acquitted." If convicted, insert number of previous convictions considered and the sentence imposed. If the accused was entitled to object and did object to trial by summary court, the record should show that the trial was authorized by an officer competent to bring him to trial before a general court-martial.)
Sp 2 Ch I . . .	N G or G	N G or G	
Ch I . . .	N G or G	N G or G	
Sp Ch II . . .	N G or G	N G or G	
or			
AN Sp and Ch . . .	N. G. or G	N G. or G.	

Place ———, Date ———, 19—

(Signature, rank, and organization) Summary Court

(NOTE —Enter below the signature, "only officer present with the command," if such is the case. No entry need be made as to explanations that may have been made to the accused. Any special pleas, etc., and the action taken thereon should be shown in the space for remarks.)

APPENDIX 9

FORMS OF SENTENCES

A sentence adjudged by a court-martial should follow one or another of the following forms or any necessary modification or combination of such forms. Forfeitures, fines, and detentions will be expressed in dollars or dollars and cents.

- 1 To have ——— dollars of his pay detained
- 2 To have ——— dollars per month for ——— months detained.
- 3 To forfeit ——— dollars of his pay
- 4 To forfeit ——— dollars per month for ——— months.
- 5 To perform hard labor for ——— days (*or months*).
- 6 To be confined at hard labor for ——— days (*or months*).
- 7 To be confined at hard labor, at such place as the reviewing authority may direct, for ——— days (*or months or years*).
- 8 To be confined at hard labor, at such place as the reviewing authority may direct for ——— months and to forfeit ——— dollars per month for a like period
- 9 To be dishonorably discharged the service and to forfeit all pay and allowances, due or to become due.
- 10 To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ——— days (*or months or years*).
- 11 To be reduced to the grade of private.
- 12 To be admonished
- 13 To be reprimanded
- 14 To be restricted to the limits of his post (*or other place*) for ——— months.
- 15 To be suspended from duty for ——— months.
- 16 To be suspended from command for ——— months.
- 17 To be suspended from rank for ——— months.
- 18 To be reduced in rank ——— files.
- 19 To be reduced in rank to the foot of the list of officers of his grade (and to remain there for ——— years).
- 20 To be reduced on the promotion list ——— files
- 21 To be suspended from promotion for ——— years after his promotion would otherwise be due
- 22 To be dismissed the service (and to forfeit all pay and allowances due or to become due).
- 23 To pay to the United States a fine of ——— dollars and to be confined at hard labor, at such place as the reviewing authority may direct, until said fine is so paid, but for not more than ——— months (*or years*).
- 24 To pay to the United States a fine of ——— dollars, to be confined at hard labor, at such place as the reviewing authority may direct, for ———

months (or years), and to be further confined at hard labor until said fine is so paid, but for not more than ——— months (or years), in addition to ——— months (or years) heretofore adjudged

25. To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

26. To be shot to death with musketry.

27. To be hanged by the neck until dead

APPENDIX 10

FORMS FOR ACTION BY REVIEWING AUTHORITY

(NOTE.—Show headquarters, place, and date of action. Signature is followed by rank, organization, and word "Commanding." The forms are not mandatory and are not intended to provide for every case.)

a. GENERAL COURTS-MARTIAL

1. In the foregoing case of — the sentence is approved and will be duly executed (or is disapproved)

2. In the foregoing case of — the sentence is approved, but owing to the length of time the accused has been in confinement — days (or months) of the confinement imposed are remitted. As thus modified the sentence will be duly executed. — is designated as the place of confinement.

3. In the foregoing case of — the findings of Specifications 1 and 2, Charge II, are disapproved. The sentence is approved and will be duly executed.

4. In the foregoing case of — only so much of the findings of guilt of the specification of Charge I and of Charge I as involves a finding of guilty of absence without leave from — to —, in violation of Article of War 61, is approved. Only so much of the sentence as provides for — is approved and will be duly executed.

5. In the foregoing case of — the sentence is approved, but the execution thereof is suspended.

6. In the foregoing case of — the sentence is approved and will be duly executed, but the execution thereof, in so far as it relates to forfeiture of pay (or to confinement), is suspended.

7. In the foregoing case of — the sentence is disapproved and a rehearing is ordered before another court to be hereafter designated.

8. In the foregoing case of — the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. — is designated as the place of confinement.

9. In the foregoing case of — the sentence is approved and will be duly executed. — is designated as the place of confinement.

10. In the foregoing case of — the sentence is approved (or confirmed) (but the period of confinement is reduced to —). The — is designated as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld.

11. In the foregoing case of —, pursuant to Article of War 50½, the finding of guilty of specification — is disapproved. Only so much of the sentence as provides for — is approved and will be duly executed. — is designated as the place of confinement.

(NOTE.—Form for supplementary action.)

b. SPECIAL COURTS-MARTIAL

(Note—Forms 1-7 above are applicable.)

c. SUMMARY COURTS-MARTIAL

1. Approved and ordered executed (*or* disapproved.)
2. Approved and suspended.
3. Approved and ordered executed, but forfeiture (*or* confinement) suspended.

APPENDIX 11

FORMS FOR ORDERS OF PROMULGATION—FORMS FOR ORDERS VACATING SUSPENSIONS

a. FORMS FOR ORDERS OF PROMULGATION

General Court-Martial } Headquarters _____,
Orders No 447 } _____, 19—.

Before a general court-martial which convened at _____, pursuant to paragraph _____, Special Orders _____, headquarters _____, 19—, as modified by paragraph _____, Special Orders No. _____, Headquarters _____, _____, 19—, was arraigned and tried:

Private John Doe, 1,682,364, Company F, Twenty-ninth Infantry.

Charge I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company F, Twenty-ninth Infantry, did at Fort Jay, N. Y., on or about March 27, 1925, desert the service of the United States and did remain absent in desertion until on or about June 30, 1925.

Charge II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company F, Twenty-ninth Infantry, did at Fort Jay, N. Y., on or about March 27, 1925, through neglect, lose one overcoat, olive drab, value \$14.84, and one blanket, light weight, value \$3.79, issued for use in the military service.

PLEAS

To the specification, Charge I: "Not guilty."

To Charge I "Not guilty."

To the specification, Charge II: "Not guilty."

To Charge II: "Not guilty."

Or

To all the specifications and charges: "Not guilty."

(NOTE—If a plea to the general issue is not entered to a specification or charge owing, for example, to the fact that the court sustained a special plea in bar, the facts will be briefly stated under "Pleas." In such a case the specification or charge need not be listed under "Findings.")

FINDINGS

Of the specification, Charge I: "Guilty."

Of Charge I: "Guilty."

Of the specification, Charge II: "Guilty."

Of Charge II: "Guilty."

Or

Of all the specifications and charges: "Guilty."

SENTENCE

To be dishonorably discharged the service; to forfeit all pay and allowances due, or to become due; and to be confined at hard labor at such place as the reviewing authority may direct for two years (Four previous convictions considered.)

The sentence was adjudged on ———, 19—.

(The sentence is approved and will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The United States Disciplinary Barracks, Fort Leavenworth, Kans., is designated as the place of confinement.)

Or

(The sentence is approved, and, Article of War 50½ having been complied with, will be duly executed. The United States Disciplinary Barracks, Fort Leavenworth, Kans., is designated as the place of confinement.)

Or

(Pursuant to Article of War 50½, the finding of guilty of specification ——— is disapproved, and only so much of the sentence as provides for ——— ——— is approved. As thus modified the sentence will be duly executed. The United States Disciplinary Barracks, Fort Leavenworth, Kans., is designated as the place of confinement.)

(NOTE—The order will be authenticated as may be prescribed in Army Regulations.)

Special Court-Martial }
Orders No. 43 }

Headquarters ———, ———, 19—

Before a special court-martial which convened at Fort Jay, N. Y., pursuant to paragraph ———, Special Orders No. ———, these headquarters, ———, 19—, as modified by paragraph ———, Special Orders No. ———, these headquarters, ———, 19—, was arraigned and tried:

Private John Doe, 1,682,364, Company F, Twenty-ninth Infantry.

Charge: Violation of the 84th Article of War

Specification: In that Private John Doe, Company F, Twenty-ninth Infantry, did at Fort Jay, N. Y., on or about March 27, 1925, through neglect, lose one overcoat, olive drab, value \$14.84, and one blanket, light weight, value \$3.20, issued for use in the military service.

PLEAS

To the specification: "Not guilty."

To the charge: "Not guilty."

FINDINGS

Of the specification: "Guilty."

Of the charge: "Guilty."

SENTENCE

To be confined at hard labor for three months and to forfeit \$14 of his pay per month for a like period. (Two previous convictions considered.)

The sentence was adjudged on ———, 19—.

The sentence is approved and will be duly executed.

(NOTE—The order will be authenticated as may be prescribed in Army Regulations.)

b. FORMS FOR ORDERS VACATING SUSPENSIONS

General Court-Martial } Headquarters, _____,
 Orders No. _____ } _____, _____, 19__.

So much of the order published in General Court-Martial Orders No. _____, 19__, these headquarters, _____, 19__, as suspends execution of sentence in the case of _____ is vacated and said sentence will be carried into execution.

Or

So much of the order published in General Court-Martial Orders No. _____, 19__, these headquarters, as suspends execution of sentence to dishonorable discharge in the case of _____ is vacated, and that part of said sentence will be carried into execution

(NOTE—The order will be authenticated as may be prescribed in Army Regulations)

Special Court-Martial } Headquarters, _____,
 Orders No. _____ } _____, _____, 19__.

So much of the order published in Special Court-Martial Orders No. _____, 19__, these headquarters, _____, 19__, as suspends execution of sentence to confinement (or forfeiture of pay) in the case of _____ is vacated, and that part of said sentence will be carried into execution

(NOTE—The order will be authenticated as may be prescribed in Army Regulations)

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[References are to paragraphs and pages, "A. W." indicates Articles of War, and "App." indicates Appendix]

Consult specific, rather than general, heads— e. g., for Trial judge advocate, look under "Trial judge advocate" and not under "Judge advocate."

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